TOWN LAW MANUAL

For Town Supervisors
and Town Board Members

An Association of Towns
of the State of New York
Publication

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FOREWORD

This publication was initially prepared and distributed in 1962. A second edition was issued in 1972, with periodic updates since. The preparation of this manual and its updates has been a large task for Association of Towns staff members, both former and current. This particular edition has been laid out and written to make it as compact and useful as possible for supervisors and town board members.

Answers to many of the day-to-day questions and problems facing town boards and supervisors are covered in this manual. Town supervisors and board members elect to take on great responsibilities, which have grown more instrumental as the issues facing towns and society as a whole have grown more complex. Given the difficult and rare issues that surface every day, further research and discussion may be necessary, along with consultation with your town's municipal attorney.

This manual, along with all other Association of Towns publications prepared for town officers, is town property. It should be shelved and passed along to one's successor in office. The cost for this publication is paid for with dues towns pay to utilize the Association of Towns' member services and benefits.

One of the principal services the Association of Towns provides is to answer procedural, substantive and general inquiries from town officials in our member towns. Members looking for sample local laws, contracts, resolutions, ordinances and other useful materials and articles can call the office to obtain them. We are proud to offer these services, and we hope this edition of the *Town Law Manual* will encourage all town officers to continue to count on us for all of their legal and technical training.

Gerry Geist, Executive Director
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TOWN LAW MANUAL

Chapter 1
GENERAL PROVISIONS AND CLASSIFICATION OF TOWNS

§ 1-1. Purpose and Responsibilities of Towns.

A. There are 932 towns in New York State. Historically, towns were an arm of the state meant to perform certain state functions. However, as towns grew and residents required more local government services, the Legislature conferred additional powers to town governments. Thus, towns are no longer merely political subdivisions of the state; instead, they have the character and capacity of responsible municipal corporations and operate as a general purpose local government.

Town Law § 2 defines a town as a "municipal corporation comprising the inhabitants within its boundaries, and formed for the purpose of exercising such powers and discharging such duties of local government and administration of public affairs as have been, or, may be conferred or imposed upon it by law." Additionally, as discussed further in Chapter 6 of this manual, Municipal Home Rule Law gives towns a great deal of authority to enact local laws

B. Home rule authority. Before 1964, town boards needed specific authorization from state legislation or the New York State Constitution in order to act, and the authority granted in those enabling statutes were strictly and narrowly construed. However, since Jan. 1, 1964, all towns enjoy constitutional home rule powers. Among other things, this means that towns can enact local laws regarding the "property, affairs and government" of the town, provided the local law

is not inconsistent with the Constitution or a law of general statewide applicability enacted by the state Legislature (e.g., laws on competitive bidding, open meetings, ethics etc.). For further information on the scope of home rule authority and how it can be used, please see Chapter 6, Town Legislation.

§ 1-2. Classes of Towns. Each town is, by statutory definition, either a town of the first class or a town of the second class, depending on its population as reflected by the latest federal decennial Census. Additionally, some first-class towns may further be classified as suburban towns (cf. § 1-4). Towns with a population of 10,000 or more and every town in Westchester County are towns of the first class (see Town Law § 10). Any town that is not a town of the first class is a town of the second class. In addition, all towns in Suffolk and Broome Counties, the Town of Potsdam in St. Lawrence County and the Town of Ulster in Ulster County are towns of the second class (see Town Law § 10).

§ 1-3. Classification and Home Rule Authority. Because towns have home rule authority, most of the differences and distinctions between towns of the second class and towns of the first class can easily be addressed by local law, and thus town classification is much less important than it once was. For example, towns of the first class have specific statutory authority to appoint deputy town attorneys (see Town Law § 20[2-b]). However, towns of the second class can use their municipal home rule authority to create the position of deputy town attorney. Additionally, there may occasionally be different procedures prescribed for towns of the second class versus a town of the first class. For example, in a town of the first class, the supervisor may designate a bookkeeper or confidential secretary, or both. In towns of the second class, the supervisor must be authorized by town board resolution to take such action (see Town Law § 29[15]).

§ 1-4. Change in Classification.

A. **Mandatory change (Town Law § 11).** When a federal decennial Census shows that the population of a town of the second class hits more than 10,000 people, its classification automatically changes to a town of the first class, and at the next biennial town election, it must elect the officers required for towns of the first class. This is referred to as a "mandatory" change of classification.

B. **Optional change (Town Law § 12).** Certain towns of the second class can change to a town of the first class. This is referred to as an "optional" change in classification and can be done by a town of the second class whenever:

(1) Its population reaches 5,000 or more (whether by special or decennial federal Census); or

(2) Its assessed valuation exceeds $10 million; or

(3) It adjoins a city with a population of more than 300,000.

§ 1-5. Suburban Towns. Some towns of the first class may also opt to classify as a suburban town under Town Law Article 3-a.

A. The provisions of the Suburban Town Law may be made applicable to a town that:

(1) Has a population of at least 25,000; or

(2) Has a population of at least 7,500 and is not more than 15 miles from a city having a population of at least 100,000, measured from their respective nearest boundary lines; provided, however, that the population of such town increased at least 65

percent between 1940 and 1960, or 40 percent between 1950 and 1960, as shown by the decennial federal Census for such years.

B. Information is available at the office of the Association of Towns on the procedures to change to a suburban town classification and the operation of towns on becoming a suburban town. This information is not included in the *Town Law Manual* because, with the authority given to towns under Municipal Home Rule Law, there seems to be no particular advantage to any town becoming a suburban town. As noted, all towns, regardless of size or classification, possess home rule local law powers, which allow a town to restructure the makeup of its government.

Chapter 2
TOWN OFFICERS AND EMPLOYEES

ARTICLE I. Overview.

§ 2-1. Public Officers vs. Employees. The difference between a public officer and employee is an important, if not always clear, distinction to make. There is no list setting forth what positions constitute public officers or what positions constitute employees. However, as a general rule, the Attorney General's Office describes an employee as one "who does not discharge independent duties but acts by the direction of others" (1997 N.Y. Op. Atty. Gen. [Inf.] 1117). On the other hand, the duties of a public officer "involve some exercise of sovereign powers," or in other words, a public officer has discretion as to how he or she performs his or her duties (see id.). Thus, for example, the highway superintendent is a public officer, whereas highway department laborers are employees. The distinction between public officer and employee can be important when determining things like the applicability of residency requirements (cf. § 2-8, infra).

§ 2-2. Elected and Appointed Officers. Under Town Law § 20 the following are elected positions in towns of the first class: supervisor, town board members, town clerk, town justices, highway superintendent, tax receiver and assessor. For towns of the second class, the supervisor, town justices, town board members, town clerk, highway superintendent, tax assessors and tax collector are elected positions (see Town Law § 20 [1][b]). If a town wants to change an elected position to an appointed position, it must pass a local law that is subject to a mandatory referendum (see Municipal Home Rule Law § 23). Additionally, there may be other specific statutes that allow towns to switch a specific elected office to an appointed office and prescribe a different procedure. Thus, before pursuing switching an elected position to an appointed one, towns should consult with

their town attorney.

If an office is not elected, it is appointed. In most cases, the town board makes appointments. However, there are exceptions to this rule. For example, principals appoint their deputies and the town clerk appoints the deputy town clerk, the highway superintendent appoints the deputy highway superintendent, etc. (see generally Public Officers Law § 9).

§ 2-3. Additional Employees. In addition to the officers and employees specifically authorized by law, towns may also have "such other employees as the town board may determine necessary for the proper conduct of the affairs of the town" (see Town Law § 20). Unlike town officers, employees need not reside in the town (cf. § 2-8, infra). They must, however, take and file a civil service oath or affirmation, unless they are employed in a position classified by Civil Service as "Labor Class" (see Civil Service Law § 62).

§ 2-4. Compensation and Benefits.

A. Compensation. The town board fixes the salary and determines the payment schedule of all officers, officials and employees of the town (see Town Law § 27[1]). The town board can also hire laborers, clerical assistants and stenographers and compensate them on an hourly or daily basis. For further discussion of salaries, please refer to Chapter 4 of this manual, titled Fiscal Matters.

B. Vacations, sick leaves, leaves of absence, overtime. A town board may provide and set rules and regulations regarding paid or unpaid vacation, sick leave and leave of absence plans for town officers and employees (see General Municipal Law § 92). The town board may also establish a town policy regarding overtime compensation (see General Municipal Law § 90), which must be consistent with the Fair Labors Standard Act.

(1) Elected officials. Elected officials do not accrue vacation or sick leave credit (see Ops. State Compt. 80-736).

C. Health insurance. Town boards may provide health insurance for its officers and employees, including retired officers and employees (see General Municipal Law § 92-a). Towns with 50 full-time employees or 50 full-time equivalent employees must also consider the Affordable Care Act. Please note that, for the purposes of the Affordable Care Act, who is included as an "employee" differs from what's discussed in §§ 2-1 and 2-3 of this manual.

D. State retirement system. Towns may join the New York State and Local Employees' Retirement System (see NY RETIR & SS § 30) thus making its officers and employees eligible for membership. Part-time employees may (but are not required to) become members (see 2 NYCRR 324.5), whereas membership is mandatory for full time employees (see 2 NYCRR 324.4). Please refer to 2 NYCRR 324.2 for a definition of what constitutes a "part-time employee."

E. Workers' compensation. Towns are responsible for providing the statutory benefits set forth in the Workers' Compensation Law to their employees while engaged in employments listed in Workers' Compensation Law § 3 (1). The list of employment is too extensive to replicate here, and reference should be made to these provisions; however, in general, highway construction work is a job involving workers' compensation benefits.

F. Disability benefits. A town, on an optional or voluntary basis, may choose to provide employees coverage under the Disability Benefits Law (see Workers' Compensation Law § 212[2]). If a town has a sick leave plan and undertakes voluntary coverage under the Disability Benefits Law, it may, either with or without

employee contributions, secure insurance to provide disability benefits. Thus, the town may be partially reimbursed for the full salary paid to the employee during his or her period of sick leave or disability.

G. Volunteer firefighters' benefits. Towns are responsible for the statutory benefits provided in cases of injuries or death to volunteer firefighters arising in fire protection districts or in unorganized areas of the town outside of villages and fire districts.

H. Deferred compensation plans. Towns may establish deferred compensation plans for employees. A deferred compensation plan is an arrangement where an employee authorizes the employer to deduct a portion of his or her pay and to invest those funds for the benefit of the employee. The employer is required to invest the deducted funds in accordance with the rules and standards adopted by the state Deferred Compensation Board. The investment can be effected by contracting with a financial organization or by participating in an approved plan established for state employees. The amount deducted from the employee's compensation is exempt from federal (not state) withholding taxes. However, it is considered part of compensation for retirement pension purposes (see State Finance Law § 5).

§ 2-5. Collective Negotiations and Employee Organizations. The Public Employees' Fair Employment Act, also referred to as the "Taylor Law" governs public sector labor relations and authorizes groups of eligible employees to unionize (see Civil Service Law §§ 200-214). Among other things, the law gives public employees the right to join (or to refrain from joining) any employee organization, to be represented by employee organizations of their own choosing, and to negotiate collectively with their public employers. The Taylor Law also authorizes towns to recognize and collectively negotiate with employee organizations and sets forth rules regarding collective

negotiations. A neutral, independent entity, the Public Employment Relations Board, often referred to as "PERB," administers the law and acts as a mediator, fact-finding board and resolves disputes over representation status. There is a plethora of rules and case law regarding negotiations and what employers can and cannot do; therefore, it is essential for towns to consult with their town attorneys.

§ 2-6. Employee Protection against Retaliatory Action. Civil Service Law § 75-b and Labor Law Article 20-c are commonly referred to as the Whistleblower's Protection Act. These provisions protect employees who disclose information to a government body regarding an employer's violation of law or regulation that presents a specific and substantial danger to public health or safety. In other words, an employer cannot take disciplinary action against an employee for disclosing such violation. However, employees must follow a specific procedure outlined in the law in order to avail themselves of this protection.

§ 2-7. Defense and Indemnification of Officers and Employees. The town board may adopt a local law or resolution providing for the legal defense and indemnification of its officers and employees in any state or federal civil action that arises from an alleged act or omission that takes place while the officer or employee was acting within the scope of his or her duties (see Public Officers Law § 18). The town may also pay for reasonable attorney fees, fines and damages; however, it may not pay for punitive damages.

ARTICLE II. Public Officers.

§ 2-8. Qualifications of Public Officers.

A. Elector. Town public officers must be electors of the town at the time of election and as long as they hold office (see Town Law § 23). An elector is a person who, if

he or she so desired, could register as a voter in the town (see 1985 Ops. Atty. Gen. (Inf) 143 [1985]). This does not mean the individual must be registered to vote in the town, simply that he or she meets the qualifications to register, specifically the residency, age and citizenship qualifications (see Election Law § 5-102).

B. Residency Qualification.

1. Statutory requirement. Both Public Officers Law § 3 and Town Law § 23 require town public officers to be residents of the town.

2. Definition. "Residency" means domicile, which the Attorney General's Office described as follows:

> The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals. …
>
> In order to acquire a new domicile there must be a union of residence and intention. Residence without intention or intention without residence is of no avail. Mere change of residence although continued for a long time does not effect a change of domicile, while a change of residence even for a short time with the intention in good faith to change the domicile, has that effect. … There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration. … A temporary residence for a temporary purpose, with intent to return to the old home when that purpose has been accomplished, leaves the domicile unchanged (1985 Ops. Atty. Gen. (Inf) 143 [1985]).

(i) Determination of domicile. This is

a question of fact that depends on the circumstances of each case. Ultimately, only a court can determine domicile (see *Hosley v. Curry*, 85 NY2d 447 [1995]; 1977 N.Y. Op. Atty. Gen. (Inf.) 271).

3. Age qualification. An individual must be 18 to hold public office (see Public Officers Law § 3; Town Law § 23; cf. Election Law § 5-102[1].

4. Citizenship qualification. A person must be a United States citizen to hold public office (see Public Officers Law § 3; Town Law § 23; cf. Election Law § 5-102[1])

§ 2-9. Oath of Office.

A. Statutory requirement. Public Officers Law § 10 and Town Law § 25 require all town officers to take and subscribe a constitutional oath of office before entering into the duties of office and within 30 days of the term of office's commencement (see also Public Officers Law § 30[1][h]).

B. Filing of oath; term. Oaths of office are filed with the town clerk (see Public Officers Law § 10 and Town Law § 25). Additionally, town justices and court clerks must also file an oath of office with the county clerk and Office of Court Administration, in addition to filing their oaths with the town clerk (see Uniform Justice Court Act §§ 104, 111). The oath is good for the term of the office for which it is taken.

C. Administering oaths. Under Public Officers Law § 10 an oath of office may be administered by:

1. A judge of the Court of Appeals;
2. The attorney general;
3. Any officer authorized to take, within the state, the acknowledgment of the execution of a deed of real

property (cf. Real Property Law § 298). This includes a justice of the Supreme Court, an official examiner of title, an official referee, a notary public or a town councilman or town justice within the jurisdiction where they serve;
4. An officer in whose office the oath is required to be filed or by his or her duly designated assistant (i.e. the town clerk);
5. A presiding officer (town supervisor) or clerk (town clerk) who shall have taken an oath of office; or
6. If the local officer is a member of the United States military, then the oath can be delivered by any commissioned officer, in active service, of the armed forces of the United States. (There are additional requirements for certification if you chose this option.)

D. Failure to take or file oath. Taking and filing an oath of office is particularly important because if an individual refuses or fails to do so within the time period established by law, the office automatically becomes vacant by operation of law (see Public Officers Law § 30[1][h]), and taking and filing it late does not cure the vacancy (see 1986 Ops. Atty. Gen. (Inf) 96 [1986]).

§ 2-10. Official Undertaking.

A. Statutory requirement; filing. Supervisors, town clerks, tax collectors, receivers of taxes, town justices, constables and highway superintendents, and any other officers or employees as required by the town board must execute and file an official undertaking in the town clerk's office in a form, sum and with sureties directed and approved by the town board. The official undertaking must also be filed within 30 days of taking office or notification of appointment (see Public Officers Law § 11; Town Law § 25).

B. Blanket undertaking. Public Officers Law § 11(2) provides that in lieu of any individual undertaking as required by law, the town board may approve the procurement of a blanket undertaking from any duly authorized corporate surety covering the officers, clerks and employees of the town. Such blanket undertaking must be approved as to form, manner of execution and sufficiency of surety by the town board and filed in the same manner as individual undertakings. This section further provides that any such blanket undertaking entered into must indemnify against losses caused by the failure of the officers or employees to faithfully perform their duties or by their fraudulent or dishonest acts.

C. Failure to comply. If an individual refuses or fails to execute and file an undertaking within the time period established by law, the office automatically becomes vacant by operation of law (see Public Officers Law § 30[1][h]).

§ 2-11. Terms of Office. Town Law § 24 outlines the terms of office of *most,* but not all, elected and appointed town officers. For the most part, elected officials serve two years, though there are exceptions, most notably, town board members serve four-year terms. Additionally, terms of office for elected offices may be extended (see § 2-11[A], infra) Town Law § 24 also specifies that all other appointed officers hold their respective offices and positions at the pleasure of the town board, except as otherwise provided by law. This means that unless there is a statute setting a term of office for an appointed officer, such as Town Law § 271 that sets the term of office for planning board members, and unless the town has a local law setting a term of office for an appointed position, appointed officers do not have a specific term of office.

A. Extending terms of office. The town board may extend an elected officer's term from two years to four

years either one of two ways:

1. **Town Law § 24-a**: Under this section, the town board of any town may adopt a resolution providing for a four-year term for any or all elected town positions. The resolution is subject to a mandatory referendum and must be adopted at least 150 days before a biennial election (every odd-numbered year, except in Broome County, where it is held in even-numbered years). The referendum must be held at the biennial election, and if passed, the four-year term of office will take effect at the next biennial election.
2. **Municipal Home Rule:** Under Municipal Home Rule Authority, any town may change the term of office of its town officers (with the exception of town justices) through a local law, subject to a mandatory referendum (Municipal Home Rule Law §§ 10(1)(ii)(a); 23(2)(e)].

   (i) There are two advantages to using the Municipal Home Rule option. First, the town board may include a provision in the local law providing that the new four-year term of office will apply to those officers elected at the same election where the change to the four-year term was approved (*Grant et al. v. Board of Elections of the County of Rockland,* 98 Misc.2d 644; Opn. St. Comp. 79-434). Second, using the Municipal Home Rule Law, the referenda can take place in the off-election year (i.e., an even-numbered year, except for Broome County), which can potentially depoliticize the issue.

§ 2-12. Resignations. A town officer resigns by delivering his or her resignation in writing to the town clerk. If no effective date is specified, the office becomes vacant immediately upon delivery to the town clerk. If an officer wishes to resign at a future date, he or she should specify the date in the written resignation. However, if the date named is more than 30 days after delivery to the town clerk (90 days for justices), the resignation nonetheless becomes effective 30 days after delivery. For the town clerk to resign, he or she should send a written resignation to the Secretary of State (see Public Officers Law § 31).

§ 2-13. Vacancies in Office.

A. How vacancies occur. Vacancies can take place in a variety of ways. These include:

1. The death of the incumbent.

2. Resignation (see § 2-12, supra).

3. Removal from office (see § 2-14 infra).

4. Ceasing to be a resident of the town.

5. Conviction of a felony or of a crime involving one's oath of office.

6. Entry of a judgment or court order declaring the officer to be insane or incompetent.

7. Judgment of a court declaring an election or appointment void or finding that an office is forfeited or vacant.

8. Refusal or neglect to file an official oath or undertaking (see § 2-9, supra).

9. Additionally, certain other acts will also create vacancies. For example, courts have held that where two candidates for the same elected office receive the same number of votes in an election, the tie vote created a vacancy upon the commencement of the term of office for which the election was held (see *Furk v. Bd. of Sup'rs of Sullivan County*, 1 NY2d 128 [1956]). Additionally, if a town officer accepts an office that is incompatible with the office he or she held. The acceptance of such a second office creates a vacancy in the office already held.

B. Authority to fill. Town Law § 64 (5) authorizes town boards to fill vacancies in town offices. However, if the town board does not have the authority to fill the position in the first instance, they do not have the authority to fill the vacancy. For example, if the deputy town clerk position is vacant, the town clerk has the authority to fill that vacancy.

C. Qualifications. A person appointed to fill the vacancy must possess the same qualifications for the office as the original electee or appointee (see § 2-8, supra).

D. Length of appointment.

1. Appointed office: If the vacancy exists in an appointed office, the appointment is for the remainder of the unexpired term.

2. Elected office (Public Officers Law § 42): This depends on when the vacancy in the elected office took place and how much time is left on the term of office.

i. Vacancies before September 20: If the vacancy occurs before September 20, the person appointed to that position will serve until the end of the calendar year, and there should be an election

in November to fill out the remainder of the term. For example, if a town board member resigns on June 30, 2015 after serving a year-and-a-half of a four-year term, the individual appointed to fill that position would serve until the end of December 2015. In November 2015, there should be an election to elect someone to fill out the remainder of the term, which in this example, would be two years.

ii. Vacancies after September 20: If the vacancy occurs after September 20, the person appointed to that position will serve for slightly more than a year until the end of the next calendar year. For example, if a town board member resigns on Oct. 30, 2015 after serving a year and 10 months of a four-year term, the individual appointed to fill that position would serve until the end of December 2016. In November 2016, there should be an election to elect an individual to fill out the remainder of the term which, in this example, would be one year. The theory being that the public does not have enough time to learn about candidates before a November election.

E. Special elections. Public Officers Law § 42(3) also authorizes the governor to call a special election to fill a vacancy in an elected office whenever a board vested with the authority to fill such vacancy is unable to do so because of a tie vote or if the board neglects to fill such vacancy for any other reason. The governor has done so on a few occasions involving town elections, but not

often.

§ 2-14. Removal from Office.

A. Elected officers. The town board does not have the authority to fire or remove an elected official. Under Public Officers Law § 36, a resident of the town or the county district attorney may commence a court proceeding to remove an individual for committing misconduct, maladministration, malfeasance or malversation in office.

B. Appointed officers and employees. The general rule is that appointed officers serve at the pleasure of the town board, unless otherwise provided in law, and so an individual could be removed via town board resolution (see Town Law § 24). However, depending on how the position is classified under Civil Service, how long the person has been in his or her position, and if they are a veteran or volunteer firefighter, an individual may be entitled to a hearing before being removed from office (see Civil Service Law § 75). Additionally, there are some statutory protections afforded to certain offices. For example, a planning board or zoning board member may not be removed without cause, and the town has to hold a public hearing (see Town Law §§ 267, 271). Finally, the town must abide by any internal procedures it has established regarding termination. The Association of Towns strongly recommends consulting with your town attorney prior to removing an appointed officer or employee.

ARTICLE III. Specific Offices.

§ 2-15. Introduction. Because towns have municipal home rule authority, each town decides for itself the makeup of town offices, and there is no "one size fits all." For example, some towns may have a combined office of town clerk and tax collector, while others have different individuals filling

the positions. Some towns may have a town comptroller while others do not. The list included here of town offices is meant to be a very general overview; it is by no means exhaustive, and there may be variations in your town.

§ 2-16. Town Board.

A. Composition. The town board usually consists of the supervisor and four councilmembers. However, the number of town board members in any town may be increased to six or reduced to three by a local law subject to a mandatory referendum pursuant to the Municipal Home Rule Law. Relatively few towns have done this to date.

B. Responsibilities. The town board is the executive and legislative branch of town government. Town Law § 64 lists the general powers of the town board, which includes, but is not limited to, managing and controlling town finances, controlling and managing town property and generally "hav[ing] and exercis[ing] all the powers conferred upon the town and such additional powers as shall be necessarily implied therefrom," (Town Law § 64[23]). Town boards also adopt budgets, fix salaries of officers and employees, establish rules of its procedure and adopt local laws, just to name a few responsibilities. Although Town Law sets forth most town board functions, other articles of law, such as General Municipal Law, Highway Law, Education Law, Agriculture and Markets Law and Not-For-Profit Corporation Law, may also provide sources of authority for town board actions.

1. **Majority of board acts as body.** The town board, as a group, is the executive head of the town and must function as a body. There is no true executive in town government like the mayor of a city or village. Thus, an individual board member or town supervisor may not unilaterally act on behalf of the town board

and each town board member has the same authority as any other board member. In most instances, a simple majority of the town board is necessary for the board to take action. Additionally, the town board may delegate certain responsibilities to the town supervisor (see § 2-7, infra).

C. Meetings. Please refer to Chapter 3.

D. Representation and advisory referenda. When a town board member votes on a proposal before the board, he or she represents, through that vote, the views of the town residents. Because of this high level of responsibility, and in order to ensure that residents' voices are accurately reflected, some board members may want residents to vote on matters before the town board takes action. However, unless there is constitutional or statutory authority, towns may not hold a referendum (see *McCabe v. Voorhis*, 243 NY 401 [1926]; 2005 Ops. Atty. Gen. (Inf) 1091 [2005]).

§ 2-17. Supervisor.

A. Responsibilities. As a member of the town board, the supervisor has no more authority than any other individual town board member (see § 2-16[B][1]infra). This means that the supervisor's vote has no more weight than any other town board member, nor does the supervisor's vote count as a tiebreaker. Although supervisors do not necessarily have more authority in most instances, they do have more responsibilities. The supervisor presides over town board meetings (see Town Law § 63) and has a number of responsibilities regarding financial matters. For a description of the supervisor's fiscal responsibilities, please refer to Town Law §§ 29 and 125.

B. Delegated authority. In order to keep the town

functioning in between town board meetings and address day-to-day issues, the town board may delegate the power and duties of administration and supervision of the town or special improvement districts to the supervisor (see Town Law § 29[16]). However, a town board may not abdicate or surrender its basic statutory responsibilities to the supervisor.

§ 2-18. Deputy Supervisor. The town board may establish the office of deputy supervisor (see Town Law § 42). The town supervisor appoints the deputy supervisor, but if he or she fails to do so within five days of there being a vacancy in the office of deputy town supervisor, the town board may make the appointment (id.). However, the deputy supervisor serves at the pleasure of the town supervisor (id.); thus, even if the town board appoints someone as deputy supervisor, the town supervisor may remove that person without town board approval. Furthermore, the town supervisor does not forfeit the authority to appoint a deputy should he or she fail to do so within five days (see 33 Opns St Comp, 1977 No. 77-655 p 133).

When a town supervisor is absent or unable to act, the deputy supervisor may perform the supervisor's duties. The definition of "absence" must be reasonable because, as the Attorney General's Office stated "[c]learly, not every momentary unavailability of the supervisor will constitute an absence within [Town Law § 42]" (1992 N.Y. Op. Atty. Gen. (Inf.) 1103). Finally, although the deputy supervisor may act instead of the supervisor, unless the deputy supervisor is a member of the town board, he or she has no authority to vote on matters before the town board (see Town Law § 42).

§ 2-19. Confidential Secretary / Bookkeeper. In towns of the first class, the supervisor appoints a confidential secretary or bookkeeper (see Town Law § 29[15]). In towns of the second class, the town board may create the position of secretary or bookkeeper or both. Once created, the supervisor has the authority to fill the positions. The town

board must fix compensation for the position in a "reasonable" amount (see id.).

§ 2-20. Highway Superintendent. The highway superintendent is in charge of the highway department and executing the statutory responsibilities listed in Highway Law § 140. These duties include, among other things, repairing and maintaining town highways and bridges and snow removal. The town board may also, pursuant to Town Law § 32, impose additional duties on the highway superintendent, such as performing work for the recreation department; however, these duties must fall under the general scope of his or her employment and may not interfere with his or her primary duties (see 24 Op. St. Compt. 146, 1968; Op. St. Compt. 81-345). As the head of the highway department, the highway superintendent has the authority to hire and fire highway employees without town board approval. However, the highway superintendent must still abide by town policies and civil service laws with respect to employment. Additionally, the town board is the one that fixes the pay or salary for highway department employees. For more information on the role of the highway superintendent, please refer to the Association of Towns' *Highway Law Manual*.

§ 2-21. Deputy Highway Superintendent. The town board may establish the office of deputy highway superintendent (see Town Law § 32[2]). Although the town board creates the office, the highway superintendent appoints the deputy who serves at the pleasure of the highway superintendent (id.). If the highway superintendent does not appoint a deputy within five days of the office being established or within five days after a vacancy occurs, the town board has the power to appoint someone (id.). However, even if the town board appoints someone, the highway superintendent may remove him or her without town board approval. Furthermore, the highway superintendent does not forfeit the authority to appoint a deputy if he or she fails to do so within five days (see generally 33 Ops. St. Compt., 1977 No.

77-655 p 133).

§ 2-22. Town Clerk. The town clerk has a number of statutory responsibilities that are too numerous to list in this manual. Among other things, town clerks issue licenses, manage records, post notices, and have filing responsibilities. Additionally, the town clerk acts as the recording secretary and takes minutes at town board meetings. For more information on the role of the town clerk, please refer to the Association of Towns' Town Clerk Manual.

§ 2-23. Deputy Town Clerk. The town clerk may appoint up to three deputies, all of whom serve at the pleasure of the town clerk (see Town Law § 30 [10]). The town clerk sets the duties of the first deputy town clerk and may authorize the first deputy to act on the town clerk's behalf (see id.). The town board has the authority to set the duties of the second and third deputy town clerks; however, in the event the town board does not do so, the town clerk may set the duties of the second and third deputies (see id.).

§ 2-24. Town Attorney. The town board may establish the office of town attorney (Town Law § 20 [2]). Although town officers must be a resident of the town, if a town that has the office of town attorney does not have an attorney residing within its boundaries, the town attorney need not be a resident (see Town Law § 23). Additionally, if the town abolishes or has not established the office of town attorney, the town board may retain an attorney or law firm to perform specified legal services. Under these circumstances, the attorney would be an independent contractor paid for actual legal services rendered and need not be a town resident (see 1988 N.Y. Op. Atty. Gen. [Inf.] 49).

§ 2-25. Town Justice. Town justices have jurisdiction in criminal and civil matters and in special proceedings as conferred by law (see Town Law § 31 and the Uniform Justice Court Act). For a more in-depth review of town justice responsibilities, please refer to the *Unified Court System*

Justice Court Manual.

§ 2-26. Court Clerk. The town board and the town justice(s) must work together and reach a consensus on who to appoint as court clerk. While the town board passes the resolution appointing or terminating the clerk, the town board may act only with the town justice's consent (see Town Law § 20). For more information on the responsibilities of the court clerk, please refer to the Office of Court Administration's *Town and Village Court Clerk Operations Manual,* available online.

§ 2-27. Assessor / Board of Assessment Review. An assessor or board of assessors estimates the value of real property in the town for taxation purposes and prepares the annual assessment roll. In towns that kept the elected three-assessor system, it is possible to change to one elected or appointed assessor by adopting a local law subject to either a mandatory or permissive referendum (see Real Property Tax Law §§ 328 and 329).
On grievance day, an assessment review board hears property owner complaints and may make adjustments to assessments. The board of assessment review consists of between three and five members, all appointed by the town board. The town assessor may not serve as a board of assessment review member (see Real Property Tax Law §§ 102[3],[4]; 523).

Planning Board Members: Please refer to Chapter 7 of this manual.

Zoning Board Members: Please refer to Chapter 7 of this manual.

Code Enforcement Officer: Please refer to Chapter 7 of this manual.

§ 2-28. Tax Collector / Receiver of Taxes. A tax collector serves in towns of the second class (collecting taxes). A

receiver of taxes serves in towns of the first class (receiving taxes and assessments). Both offices have similar powers and duties that are primarily listed in Town Law §§ 35 and 37 and Real Property Tax Law. In addition to collecting taxes, a receiver of taxes may collect school taxes, assessments and, except as otherwise provided by law, water rates and sewer rents, among other things. For further information on tax collectors and receivers of taxes, please refer to the Association of Towns' *Tax Collector Manual*.

§ 2-29. Committees.

A. Town board committees. Many towns find that there is a considerable amount of work to do in between meetings in order to gather information on matters requiring town board decisions. The town supervisor may appoint committees of town board members to make studies and report back with recommendations (see Town Law § 63). Town board committees can conduct formal or informal meetings and hearings; however, they cannot make any decision for the town board. Please note that these committees are considered public bodies and thus are subject to the Open Meetings Law.

B. Citizen committees. Although not specifically authorized by statute, town boards may appoint one or more citizen committees to advise them on particular matters. The town board cannot delegate its authority or authorize the spending of public monies by private individuals; thus, citizen committees are advisory only. Their makeup can vary in size and may include one or more members of existing boards or bodies of the town. For example, a town may set up a master plan advisory committee of local citizens with expertise in land use issues, and appoint the chairman of the planning board to the committee and a town board member as an ad hoc member.

§ 2-30. Holding Multiple Offices / Compatibility of Office: There is no overarching law that says one person may hold only one position; however, there are some situations where two positions are incompatible, and therefore, one person may not hold both at the same time. Additionally, a town's ethics code may prohibit dual office holding. Offices or positions of employment are incompatible if:

A. There is a specific statutory prohibition. For example, Town Law § 20(4) states that an individual cannot hold more than one elective town office; thus, an elected highway superintendent may not also be a town board member.

B. One position is subordinate to the other. Subordination occurs when one office has authority over another position. Another way to think of it is that you cannot be the boss of yourself. For example, because the town board adopts the budget, which includes compensation levels for town employees, and in general, is responsible for hiring and firing employees, a town board member should not also hold a position as a town employee.

C. There is a conflict in duties between the two positions. The Attorney General's Office has described it as being an "inconsistency" in offices (see 1993 Ops. Atty. Gen. (Inf) 1005 [1993]), i.e. whether having one person hold the two positions in question upsets a system of checks and balances. For example, a code enforcement officer should not also be on the zoning board of appeals because the ZBA regularly reviews decisions made by the code enforcement office.

ARTICLE IV. Ethics and Conflicts of Interest.

§ 2-31. Overview. Public officials and employees are held to certain standards of behavior; municipal "ethics" refers to principles found in law that define behavior as proper. Ethics laws are both a sword and a shield designed "to protect the public from municipal contracts influenced by avaricious officers, [and] to protect innocent public officers from unwarranted assaults on their integrity." State laws on ethics are found in General Municipal Law Article 18 and common law, which is law created by courts. In addition, towns must have their own ethics code, which should be reviewed whenever confronted with an ethics or conflict of interest question.

§ 2-32. Code of Ethics. General Municipal Law Article § 806 requires each town to adopt a code of ethics containing standards for town officers and employees to follow. Local codes can be more restrictive than what is prescribed by General Municipal Law Article 18. Common topics covered in ethics codes include what constitutes a conflict of interest, nepotism, gift provisions and when recusal is required. The town supervisor must ensure that each officer and employee receives a copy of the ethics code.

§ 2-33. Boards of Ethics. Article 18 authorizes but does not require the establishment of a local board of ethics. The board must consist of at least three individuals, who are appointed by the town board, a majority of whom are not officers of or employed by the town, but one of whom is an employee or officer of the town. The function of the board of ethics is to render advisory opinions to town officers and employees regarding Article 18 or the local code of ethics.

§ 2-34. Evaluating Conflicts of Interest. General Municipal Law Article 18 prohibits a municipality from entering into a contract where an employee or officer has an interest in the contract and has the authority to either: (a) negotiate,

prepare, authorize or approve the contract or authorize or approve payment thereunder; (b) audit bills or claims under the contract; or (c) appoint an officer or employee who has any of the powers or duties set forth above (see General Municipal Law § 801). Additionally, courts will find conflicts of interest even when there is no violation of General Municipal Law Article 18 if there is an appearance of impropriety. In order to determine if a conflict of interest exists, AOT recommends asking the following six questions:

1. Is there a contract with the municipality?
2. If so, does an officer or employee have an "interest" in the contract?
3. If so, does the officer or employee with the interest have "control" over the contract?
4. Do any statutory exceptions listed in General Municipal Law Article 18 apply?
5. Does the town's local ethics code apply?
6. Is there an "appearance of impropriety"?

If the answers to questions 1 through 3 are "yes" and no statutory exceptions apply, one need not move onto questions 5 and 6 because there is a conflict of interest under General Municipal Law Article 18 and the town may not enter into the contract. Please note that recusal is insufficient to cure a General Municipal Law Article 18 conflict of interest.

A. Is there a contract with the municipality? Under General Municipal Law Article 18, a contract means any claim, account or demand against or agreement with a municipality. Contracts may be express or implied, verbal or written.

B. Does an officer or employee have an "interest" in the contract? Interest means a direct or indirect financial or material benefit. General Municipal Law also states that an officer or employee has an interest in the contracts of a husband or wife, minor children or

dependents, excluding employment contracts with the town. Furthermore, General Municipal Law states that an officer or employee has an interest in contracts with a firm, partnership or association where the officer or employee is a member or employee and in contracts of a company where an officer or employee is an officer, director, employee or stockholder.

C. Does the officer or employee with the interest have "control" over the contract? Control means that the officer or employee with the interest has the authority to, either individually or as a board member: negotiate, draft, authorize or approve the contract; authorize payment under a contract; audit bills or claims under the contact; or appoint someone with any of these powers or duties.

D. Do any statutory exceptions listed in General Municipal Law Article 18 apply? General Municipal Law § 802 lists exceptions to the statutory prohibition against contracts where an officer or employee with control over the contract has an interest. Exceptions are only permitted if the town officers or employees who have, will have or later acquire any interest in any actual or proposed contract with the town "publicly disclose the nature and extent of such interest in writing" to the town board as soon as they have knowledge of such interest. Written disclosure must be made part of the town board's official record. Once made, no further disclosures need to be made by the officer or employee with respect to additional contracts with the same party during the remainder of the fiscal year (see General Municipal Law § 803). The list below is not exhaustive, but some of the more common exceptions include:

1. **Depository institutions.** The first exception relates to a bank or trust company named as depository, paying agent, registration agent or for the investment of

municipal monies. Any bank may be named except one in which the supervisor, comptroller or their deputies and employees have an interest. In other words, the law will not force the designation of a bank outside of the town because of prohibited conflicts of interest so long as full and complete disclosure of such interest is made known to the town board.

2. **Employment.** The law does not prohibit a contract with a person, firm, corporation or association in which a town officer or employee has an interest solely by reason of private employment as an officer or employee of any such firm, etc., so long as the officer's or employee's income, compensation or remuneration from private employment is not directly affected by the contract, and the duties of private employment do not directly involve the procurement, preparation or performance of any part of the contract.

3. **Real property purchase.** The law allows towns to purchase real property from its officers and employees provided that the purchase and the consideration therefor are approved by an order of the Supreme Court upon petition of the town board.

4. **Real property condemnation**. Towns may acquire real property or an interest therein from its officers and employees by means of condemnation proceedings pursuant to Eminent Domain Procedure Law.

5. **Nonprofits.** Contracts between the town and a membership corporation or other voluntary nonprofit corporation or

association – a fire company, a voluntary hospital – in which a town officer has an interest or is a member, are permitted.

6. **Pre-existing contracts.** Contracts that existed before the town officer or employee was elected or appointed are allowed, but the law does not authorize the renewal of any such contract if the existing interests and conflicts do not otherwise qualify under one of the exceptions.

7. **$750 threshold.** If the total of all claims, accounts or demands in which a town officer or employee has an interest during one fiscal year is less than $750, the contract is not prohibited.

8. **Stock.** If the contract is with a corporation (other than a bank or trust company) in which a town officer or employee has an interest by reason of stock holdings when less than 5 percent of the outstanding stock of the corporation is owned or controlled, directly or indirectly, by the town officer or employee, the contract is permitted.

E. Does the town's ethics code apply? Even if there is no conflict of interest under General Municipal Law Article 18, there may be a prohibited conflict of interest pursuant to the town's ethics code.

F. Is there an appearance of impropriety? Even if there is no violation under General Municipal Law Article 18, courts have found conflicts of interest when actions raise an appearance of impropriety. There is no standard test to apply to determine if there is an appearance of impropriety; however, courts have stated that the potential conflict should be more than speculative.

Towns may consider posing the question to its local ethics board.

§ 2-35. Financial Disclosure. Towns with populations of more than 50,000 must adopt provisions for the filing of annual statements of financial disclosure by their officers and employees. Those large towns that chose not to do so are subject to the annual disclosure filing requirements and forms provided in General Municipal Law § 812. Towns with less than 50,000 in population can elect to subject themselves and their officials and employees to annual financial disclosure requirements, including those contained in § 812. That section contains an extensive annual disclosure form. Additionally, any assessor receiving $20,000 or more (in the aggregate) must annually file a disclosure form (see RPTL § 336; GML § 812[1][a]).

§ 2-36. Other Prohibited Actions. In addition to contractual conflicts of interest, General Municipal Law Article 18 sets forth other prohibited actions, namely:

A. Accepting any gift valued more than $75 in any form if it may raise questions of undue influence in official duties;

B. Disclosing confidential information to further personal interests;

C. Receiving any payment, direct or indirect, for services in relation to any matter before any municipal agency of which one is an officer or employee or whereby one's compensation is dependent or contingent upon action by such agency (but allowing fixing of fees to be paid upon the reasonable value of the services rendered).

§ 2-37. Disclosure in Certain Applications. The provisions of General Municipal Law § 809 place responsibility on the applicant for any land use change, permit or variance to disclose the names of any local or state officials who have an

interest in the application. Under General Municipal Law § 809, an officer or employee has an interest in the application when he, his spouse, or their brothers, sisters, parents, children, grandchildren, or the spouse of any of them:

- is the applicant;
- is an officer, director, partner, or employee of the applicant; or
- legally or beneficially owns or controls stock of a corporate applicant or is a member of a partnership or association applicant; or
- is a party to an agreement with such an applicant, express or implied, whereby he may receive any payment or other benefit, whether or not for services rendered, dependent or contingent upon the favorable approval of such application, petition or request.

Ownership of less than 5 percent of the stock of a corporation whose stock is listed on the New York or American Stock Exchanges shall not constitute an interest for the purposes of this section.

Chapter 3
TOWN BOARD MEETINGS AND PUBLIC HEARINGS

§ 3-1. Location. Town board meetings must be held within the territorial limits of the town (see Town Law § 62[2]). If the law provides for a joint meeting of two or more town boards, for example, in establishing a joint fire district, the meeting must be held in a town represented at the meeting. Finally, a few individual towns have authority from the state Legislature via special act to hold town board meetings outside the town.

§ 3-2. Access. Under the Americans with Disabilities Act (ADA), local government programs must be accessible to individuals with disabilities, and all new construction or alterations to buildings after Jan. 26, 1992, must provide the disabled with access. The New York State Uniform Fire Prevention and Building Code contains similar requirements for all new buildings and reconstruction. Furthermore, Public Officers Law § 103(b) requires a public body to make all reasonable efforts to hold meetings in facilities that permit barrier-free access to the physically handicapped.

§ 3-3. Frequency. Town boards in towns of the first class must hold at least one meeting per month (see Town Law § 62 [2]). There is no statutory requirement regarding how often a town board must meet in towns of the second class, but it should meet regularly enough to attend to town business.

§ 3-4. Types of Meetings.

A. Regular meetings. There is no statutory definition for what constitutes a "regular" meeting. Generally, the town can think of a regular meeting as a meeting that they would normally hold. For example, the phrase might refer to meetings established by the town board for a

fixed time and place throughout the year, such as "7:00 p.m. on the first Monday of each month in Town Hall."

B. Special meetings. A town supervisor may, on his or her own, call a special meeting at any time by giving the other town board members at least two days' written notice specifying the time and place of the meeting. Alternatively, if two town board members submit a written request for a special board meeting, the supervisor must schedule a special meeting within 10 days of the request (see Town Law § 62[2]). Business conducted at a special meeting held without two days' notice is valid as long as all the councilmembers had actual notice of the meeting, attended and participated (see 1980 Op. Atty. Gen. [Inf] 109; 18 Op. St. Comp. No. 442]).

C. Budget meetings. Town boards must meet within the timeframes specified by statute regarding the tentative budget, preliminary budget and final budget. For more information on these dates and the budget process please refer to Chapter 4 in this manual.

D. Organizational meeting. The organizational meeting refers to a meeting held in the beginning of the year where, generally, the town board appoints officers, authorizes contracts and conducts a plethora of other business in order to get the town government organized to function throughout the year. Although there is no statutory requirement that towns hold an organizational meeting, one should be held as soon as possible after the New Year begins. Organizational meetings may be a special town board meeting or as part of a regularly scheduled meeting (see Op. St. Compt. No. 82-145). For a list of matters that should be considered and more information on the organizational meeting, please refer to the Association of Towns' publication "*First Meeting of the New Town Board*."

E. Work sessions. Some towns designate certain meetings as "work sessions" or "informal meetings" because the board has no intention of voting on any matter or taking any action. Significantly, there is no statutory reference to "work sessions" or the like, and any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that is open to the public and requires notice, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized (see *Orange County Publications v. Council of the City of Newburgh*, 45 NY 2d 947 [1978]).

§ 3-5. Notice.

A. Town board meetings: Notice of the time and place of a meeting must be conspicuously posted in at least one public location (e.g., the town clerk's bulletin board) and given to the news media at least 72 hours before any meeting scheduled at least a week in advance (see Public Officers Law § 104 [1]). Where a meeting is scheduled less than a week in advance, notice to the news media and public posting must be done to the extent practicable (see Public Officers Law § 104 [2]). For further information on notice requirements, please refer to the Association of Towns' *Town Clerk Manual*.

B. Public hearings: It is imperative to check the statute that calls for a public hearing and follow the procedure prescribed by that statute. For example, the town needs to hold a public hearing before adopting a local law, and Municipal Home Rule Law §20 (5) requires the notice be published in a newspaper of general circulation in the town at least five days in advance of the public hearing. However, the notice required for public hearings on other matters may differ, depending on what the statute requiring the public meeting says.

§ 3-6. Agendas. Although many town boards prepare

agendas for meetings, they are not required to by statute. If a town chooses to use an agenda, it should do so in accordance with the rules of procedure adopted by the town board or with past practice if not otherwise addressed.

§ 3-7. Meeting Packets. Public Officers Law, §103 (e) requires towns, upon request and that have the capability to do so, to make available before the meeting information that will be discussed during the meeting and is provided to town board members in advance of the meeting, including but not limited to proposed resolutions, proposed policies and proposed local laws. Foil fees may be charged for these packets. In addition, if the town maintains a regularly and routinely updated website and utilizes a high-speed Internet connection, such records must be posted on the website to the extent practicable as determined by town prior to the meeting.

§ 3-8. Meeting Procedure. The town board may determine its own rules of procedure (see Town Law § 63), which should also be made known to the public. For sample rules of procedure adopted by other towns, please contact the Association of Towns. In the absence of a set of formal rules of procedure, longstanding practice may govern (see Op St Comp No. 81-417; OML- AO-2852).

§ 3-9. Voting and Quorum. Every question shall be voted on with an "aye" and "no/nay" with the names of the members present and their votes entered in the meeting minutes. Voting by proxy, telephone or affidavit is prohibited, and town board members must be physically present in order to vote. A quorum of the town board, that is, a majority of the entire town board must be present to conduct business (in other words, three members out of a five-member board) (see Town Law, §63; General Construction Law, §41). A majority vote of the fully constituted board, regardless of vacancies, absences or abstentions, is required to approve any action (see id). There are some exceptions where more than a straight majority may be required – for example, a

supermajority of the town board is required to override a county planning board's recommendation pursuant to General Municipal Law, §239-m. Always check with the town attorney where questions arise regarding the vote required to carry any action.

§ 3-10. Role of Town Clerk. The clerk must attend every meeting and keep a written record of all proceedings of the board even though he or she is not a member of the board and does not have a vote on matters coming before the board. If, for some reason, the clerk or the deputy town clerk is not present, the town board may designate someone, other than a town board member, to act as deputy town clerk and take minutes (see Town Law § 30[10]).

§ 3-11. Role of Town Supervisor; Deputy Supervisor.

A. The town supervisor presides at all town board meetings. In the supervisor's absence, the deputy supervisor acts as the presiding officer; however, if there is no deputy supervisor or the deputy is not present, the town board members present may designate one of their members to act as temporary chairperson. Please note that the deputy supervisor has no authority to vote unless he or she is also a town board member. In that case, he or she votes by virtue of his or her position as a councilmember, not as deputy supervisor.

B. The supervisor is a member of the town board and like any other member of the town board must vote on matters before the town board. There is a common misconception that the supervisors vote acts as a tiebreaker or carries more weight; however, this is not true. The supervisor's vote carries no more or less weight than any other vote and is counted the same as any other town board member.

§ 3-12. Public Participation in Town Board Meetings and Public Hearings.

A. Right to participate. Although Open Meetings Law (discussed further herein) gives the public the right to attend town board meetings and to listen to town board deliberations, the public does not have the right to speak at town board meetings except as provided by rules created and adopted by the town board. According to the New York State Comptroller's Office:

> A town board has the right to promulgate rules of procedure for the orderly conduct of its meetings and for the proper management of the business and affairs of the town (Town Law § 63). The town board may invite and permit residents of the town to participate therein so long as such participation is orderly and constructive and does not interfere with the business and purpose of the meeting. To carry out its purposes, the town board may prepare and circulate an agenda limiting the time and scope of the discussion by persons attending such meetings. This Department has stated that 'in general, the public is free to attend [ ] town board meetings,' but does not have a right to speak at a town board meeting except as provided by board rules. 'The town board may adopt rules and procedure limiting discussion of matters before the board.' (22 Op. St. Comp. 311, 1966)

In comparison, the public does have a right to participate in public hearings. Per the New York State Comptroller's Office:

> The term 'public hearing' has been variously discussed or defined as follows:
> (a) " … A statutory direction that a notice of

public hearing be published means that a fair and impartial hearing be held pursuant to such notice and that all interested parties attending the hearing be accorded an opportunity to be heard. …"
(b) "'Public hearing' means a right to appear and give evidence and the right to hear and examine witnesses …"
(c) "'Public hearing.' Any hearing open to the public, or any hearing, or such part thereof, as to which testimony or other evidence is made available or disseminated to the public by the agency."
(d)"'Its very purpose [the public hearing] is to give the public an opportunity to express its views and to make inquiries in respect to budget matters, hence, the public may freely participate in such meetings.' (See 69-405, Dept. of Audit and Control, 6/6/69.)

B. **Reasonable rules of procedure for public participation.** Rules pertaining to public participation must be reasonable and uniformly enforced. They should be made widely available to the public beforehand and read at the beginning of a public comment period. Rules typically indicate at what point during the meeting public comment will be permitted (e.g. at the beginning or end of a meeting). The rules might also include the amount of time each person may speak and whether they may speak on any issue or just issues on the agenda. In addition, the Committee on Open Government has noted that the town board could clearly adopt rules to prevent verbal interruptions, shouting or other outbursts, as well as slanderous or obscene language or signs and movement during the meeting in order to ensure an orderly meeting and provide the clear ability for those in attendance to hear and observe the discussions and proceedings (see OML-AO-2974). The Committee on Open Government has further opined that if the rules are

not followed, the town supervisor may contact a local law enforcement agency. Often, the presence or possibility of the presence of an officer will encourage decorum. If a person continues to interrupt, the Committee on Open Government has opined that the town supervisor could ask the officer to remove the person or persons from the meeting (see OML-AO-3295).

§ 3-13. Use of Cameras, Video and Audio Equipment. The public and the media have the right to photograph and to use recording equipment (video, audio, etc.) to document town board meetings (see Public Officers Law, §103 [d] [1]). However, the town board may adopt reasonable rules for the use of such equipment. (See Public Officers Law §103 [d] [2].)

§ 3-14. Broadcasting, Webcasting and Streaming Town Board Meetings. The town board is authorized to broadcast, webcast or stream its own meetings [Town Law, §63; Public Officers Law, §103(d)(2)]. In addition, the Public Officers Law expressly authorizes the public and the media to broadcast, webcast or transmit by audio public meetings [Public Officers Law, §103(d)(2)].

§ 3-15. Open Meetings Law. Open Meetings Law mandates that meetings where a quorum of the public body is present must be open to the general public.

A. Applicability to town board and other bodies. The Open Meetings Law applies not only to town boards and other town bodies and commissions performing a governmental function, but to committees and subcommittees thereof consisting of two or more individuals (Public Officers Law § 102[2]).

B. Meeting defined. Public Officers Law §102(1) defines the term "meeting" to mean "the official convening of a

public body for the purpose of conducting public business." "Meeting" has been broadly interpreted by the courts, and they have found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized (see *Orange County Publications v. Council of the City of Newburgh,* 60 AD 2d 409, aff'd 45 NY 2d 947 [1978]).

> **1. Work sessions**. The application of the Open Meetings Law to "work sessions," "workshops" or "agenda meetings" often creates some confusion. The statute does not contain any reference whatsoever to work sessions. It merely defines the term "meeting." The Court of Appeals has agreed with lower courts that the definition of "meeting" is broad enough to include a work session or workshop, etc. The important elements of a meeting are the convening of a majority of the members of the public body and the discussion of public business. Even if a vote is not taken at such work sessions, the court considered them to be meetings, and consequently, open to the public (see *Orange County Publications, Div. of Ottaway Newspapers, Inc. v. Council of City of Newburgh*, 60 AD2d 409 [2d Dept 1978] affd sub nom. *Orange County Publications, Div. of Ottaway Newspapers, Inc. v. Council of City of Newburgh*, 45 NY2d 947 [1978]).

C. Exceptions. There are three types of meetings that are exempt from Open Meetings Law:

1. Judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning board of appeals;

2. Deliberations of political committees, conferences and caucuses

> a) "Deliberations of political committees, conferences and caucuses" means a private meeting of members of the town board who are members or adherents of the same political party, without regard to (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations. … A political conference or caucus may be held in private even if all of the members of the town board are of the same political party (but see *Buffalo News, a Div. of Berkshire Hathaway Inc. v. City of Buffalo Common Council*, 154 Misc 2d 400 [Sup Ct 1992]; Comm. on Open Gov't. OML-A0-2808 [November 10, 1997]) and even if the subject of the discussions and deliberations include public business. However, while the state Legislature found that a "private, candid exchange of ideas and points of view among members of each political party concerning the public business to come before legislative bodies" promotes the public interest, when what occurs at such a meeting goes beyond a candid discussion and amounts to the conduct of public business, the Open Meetings Law is violated (see *Humphrey v. Posluszny*, 175 AD2d 587 [1991]).

3. Any matter made confidential by federal or state law.

a) An attorney-client relationship is considered confidential under Civil Practice Law and Rules § 4503; thus, when attorney and client, which may include town attorney and town board, establish privilege of relationship, communications made pursuant to that relationship are confidential under state law and exempt from the Open Meetings Law. This privilege is, however, applicable only when the client (town board) seeks the professional, legal advice of the attorney acting in his or her capacity as an attorney (Comm. on Open Gov't. OML-AO-1223 and 1189). Thus, the board may meet privately with its attorney before or after a town board meeting for the express purpose of securing an opinion of law, legal services or assistance in a legal proceeding (Comm. on Open Gov't. OML-AO-1189).

§ 3-16. Executive Sessions.

A. Definition. "Executive session" is a portion of an open meeting during which the public may be excluded (see Public Officers Law § 102[3]).

B. Procedure. The procedure to call an executive session is set forth in Public Officers Law § 105(1). A town board member must move to enter into executive session, and the motion must be approved by a majority of the entire town board. Additionally, the motion must identify the general area or areas of the subject or subjects to be considered during executive session. A motion for entry into an executive session must provide

sufficient detail to enable the public to know whether an executive session is appropriate; however, the motion is not required to identify the person or persons who are the subject of discussion (see Comm. On Open Gov't. AO 2966).

C. Items that may be discussed. Only the following matters specified in Public Officers Law § 105 may be discussed and acted on in an executive session:

1. A matter that will imperil the public safety if it is disclosed;

2. A matter that may disclose the identity of a law enforcement agent or informer;

3. Information with respect to investigation or prosecution of a criminal offense that would jeopardize effective law enforcement if disclosed;

4. Discussions relating to proposed, pending or current litigation;

5. Matters relating to collective negotiations under the Taylor Law;

6. Medical, financial, credit or employment history of a particular person or corporation, or relating to appointment, promotion, demotion, discipline or removal;

7. Preparation, grading or administration of examinations;

8. Acquisition, lease or sale of real property or securities when publicity would substantially affect the value.

D. Personnel matters or litigation. Executive sessions

are most frequently used to discuss personnel matters or litigation.

1. First, Public Officers Law § 105(1)(f) authorizes the town board to enter into executive session to discuss what is commonly referred to as "personnel matters." The statutory language, however, does not include the word "personnel." The actual statutory language (as noted above) reads as follows: "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation." The Committee on Open Government offered the following comments regarding the proper language to use when entering into executive session to discuss personnel matters:

> Due to the presence of the term 'particular' in § 105(1)(f), it has been advised that a motion describing the subject to be discussed as 'personnel' or as a 'specific personnel matter' is inadequate, and that the motion should be based upon the specific language of § 105(1)(f). For instance, a proper motion might be: 'I move to enter into an executive session to discuss the employment history of a particular person (or persons).' Such a motion would not [in the Committee's opinion] have to identify the person or persons who may be the subject of the discussion (Comm. on Open Gov't. OML AO-2444, 1995).

2. Public Officers Law § 105(1)(d) authorizes the town board to enter into executive session for the

purposes of discussing "proposed, pending or current litigation." In construing this language, one court stated that the purpose of paragraph (d) is "to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings." (*Mtr of Concerned Citizens to Review Jefferson Val. Mall v. Town Board of Town of Yorktown*, 83 AD2d 612, 613 [2d Dept. 1981]).Therefore, the town board may discuss a litigation strategy behind closed doors but may not discuss issues that may have only the potential to lead to litigation.

E. **Minutes.**

1. Summary minutes must be made of any final determination taken by formal vote, including the date and the vote thereon; however, such summary should not include any matter that is not required to be made public under the Freedom of Information Law. Such summary minutes shall be available to the public within one week from the date of the executive session.

2. If no formal action was taken in an executive session, as is often the case, then no executive session minutes need be taken. For example, if the session consisted of a discussion of a personnel matter, but no final action or determination was agreed to or made, then no minutes are required. There would, of course, be minutes of the open meeting at which the motion and vote to go into the executive session was made.

F. **Public monies.** Public monies cannot be appropriated by formal vote in an executive session.

G. **Attendance.** The Open Meetings Law provides that attendance at executive sessions must be permitted to

any member of "the public body" (i.e., the town board members) and any other individuals authorized by such body. Therefore, opinions of the state comptroller (78-254 and 78-462) have concluded that the town clerk has no ***right*** to attend such sessions but that the town board may, in its discretion, ***allow*** the clerk to attend. If the clerk is not allowed to attend, someone should be designated to take any necessary minutes.

Chapter 4
FISCAL MATTERS

ARTICLE I. General Provisions.

§ 4-1. Responsibility of the Town Board. The Town Law places with the town board the responsibility for the general management and control of the finances of the town. So, it is the town board's function to raise monies through the imposition of a real property tax to fund the town's budget, if necessary and, additionally, ensure that the town's monies are expended in a proper and legal manner.

§ 4-2. Responsibilities of the Supervisor. Town Law § 29 provides that the town supervisor acts as treasurer and disbursing officer for the town and any special district within the town. The supervisor also serves as the town's budget officer, although he or she has the ability to delegate this authority and appoint any person to serve as budget officer.

§ 4-3. Budget and Fiscal Year.

A. **Fiscal year; budget.** The town's fiscal year runs from January 1 to December 31. The monies to run the town government are raised, among other ways, through real property taxes. The funds necessary for the fiscal year are determined by the town budget, which is prepared and adopted during the fall of the preceding fiscal year. Real property taxes are levied and collected beginning in January of each fiscal year to fund the town budget.

B. **Expenditures.** Every expenditure or commitment of town monies must be within the provisions expressed in the annual town budget. No monies may be spent or contracted to be spent, nor any liability incurred, involving the expenditure of money unless otherwise provided for in the annual budget.

§ 4-4. Town Budget Calendar.

Action	Date	Towns in Westchester & Monroe Counties	Town Law
1. Budget officer furnishes heads of administrative units (depts. and officials) with estimate forms	9/1	10/1	Recommended
2. Departmental submission of estimate by	9/20	10/20	Section 104
3. Budget officer reviews and prepares tentative budget; files with town clerk by	9/30	10/30	Section 106 (2)
4. Town clerk presents tentative budget to town board by	10/5	11/10	Section 106 (3)
5. Review and revision by town board; preparation of preliminary budget; filed in town clerk's office	Upon completion of review and modification of tentative budget		Section 106 (4)
6. Notice of public hearing	At least five days prior to hearing	At least five days prior to hearing	Section 108
7. Public hearing by	Thursday following Election Day; may be adjourned, but not beyond 11/15	12/10	Section 108
8. Final revision of preliminary budget	After public hearing but prior to adoption of final budget	12/15	Section 108

9. Submit to OSC information necessary for calculating tax levy limit	Before adoption of final budget	Before adoption of final budget	General Municipal Law section 3-C
10. Enact tax cap override local law, if necessary	Before adoption of final budget	Before adoption of final budget	General Municipal Law section 3-C
11. Adoption of budget by	11/20	12/20	Section 109

ARTICLE II. Real Property Tax Cap.

§ 4-5. Overview. In 2011, the Legislature enacted the real property tax cap, which established a limit on the annual growth of property taxes a local government or school district may levy to either 2 percent or the rate of inflation, whichever is less. This prohibits a town from imposing a property tax in excess of 2 percent or the rate of inflation of the prior year's levy, unless the town has enacted an annual local law by a supermajority of the board overriding the tax cap. In 2015, the Legislature extended the sunset date of the real property tax cap to June 2020. In recent years, the levy limit has been well below 2 percent, with the 2016 limit capped at 0.73 percent.

§ 4-6. Applicability. The real property tax cap applies to all local governments outside of New York City, including all counties, cities, towns, villages, fire districts, school districts (with certain exclusions) and special districts.

§ 4-7. Special Districts. As previously indicated, the tax cap applies to most special districts including, among others, sewer, water and fire protection districts. Generally speaking, if a special district has a separate, independently elected board or a board that is appointed by the town that is permitted to levy a tax, either on its own or by a municipality, the special district is subject to the tax cap. Often, a town has questions regarding whether certain

special districts should be included in the town's tax cap calculation or if the special district's tax cap calculation stands on its own. If the budget of a special district is funded by revenue generated from its own taxing authority, or from the tax levy that the town is required to impose on its behalf (e.g. a fire district), it is included within the special district's tax cap. If, however, the special district budget is funded by revenue derived from the town, and the town is not required to levy on behalf of the district, the town must include the special district's budget in its tax cap calculation.
Additionally, if a special district is established, administered and governed by the town, such district must be applied to the tax levy limit of the town. If a special district is funded solely through user fees, such district is not subject to the tax cap.
It is important to note that although the statute provides that the tax levy limit does not apply to the first fiscal year of newly created special districts (see General Municipal Law § 3-c [4] [c]), the comptroller's office has indicated, based upon guidance from the Department of Taxation and Finance, that a town must include the levy of a newly created special district in its tax cap calculation.

§ 4-8. Formula – Calculating the Levy Limit. General Municipal Law § 3-c sets forth a complex formula for local governments to calculate their tax levy limit. To begin:

- Take to the previous year's levy* and multiply that number by the tax base growth factor put forth by the Department of Taxation and Finance. The tax base growth factor is determined by the quantity change factor, which looks to the development and increased assessed valuation that has occurred within a municipality.
    - *Note that any reserve offsets or reserve amounts set aside in the prior fiscal year due to an erroneous calculation must be calculated with the prior year's levy before multiplying the figure by the tax base growth

factor.

- Next, add any PILOTs receivable from the prior year.
- Multiply this amount by the allowable levy growth factor (either 2 percent or the rate of inflation, whichever is less).
- Then, subtract any PILOTs receivable in the upcoming fiscal year.
- Lastly, add any available carryover from the prior fiscal year. Available carryover allows a local government that levied less than their allowable limit in a fiscal year to carry up to 1.5 percent of that amount over to the next year.
- It should be noted that a local government may adjust its tax cap calculation for any transfers of function that have occurred between local governments; if this occurs, the comptroller's office will notify the affected jurisdictions of the costs and savings to apply to their tax cap calculation.

§ 4-9. Exclusions. General Municipal Law § 3-c allows local governments to exclude certain expenditures from their tax levy limit. Specifically, local governments may exclude:

- Tort Costs – Any costs that arise from a court order or judgment against the town stemming from a tort action may be excluded; however, the exclusion applies only to those costs that exceed 5 percent of the total prior year's tax levy.

- Pension Costs – Any pension costs associated with the annual growth in the system average actuarial employer contribution rate that exceeds 2 percentage points.

§ 4-10. Legislative Override. Local governments that are unable to comply with the tax cap have the ability to override the tax levy limit. To override, the town board must adopt a local law by a supermajority (60 percent) vote of the board.

While there is not specific language required of the local law, it must contain language that clearly evinces the intent to override the tax cap. Once the local law is adopted, the board may adopt a budget in excess of the cap.

§ 4-11. Filing with the Comptroller's Office. Towns must submit any information necessary for calculating the tax levy limit with the state comptroller's office prior to adopting the budget.

§ 4-12. Errors in Tax Levy Calculation. If a local government makes an error in their tax cap calculation and exceeds the cap without a local law on the books authorizing an override, the excess funds must be placed into a reserve account in accordance with the state comptroller's requirements.

For additional information on the Real Property Tax Cap, please see the Department of Taxation and Finance's guidance document titled "The Property Tax Cap: Guidelines for Implementation."

ARTICLE III. Budgeting Process.

§ 4-13. Start of Process; Procedural Requirements. The first steps in the adoption of a town budget begin in September. The budget process requires actions to be taken within specific time parameters, as indicated in the chart in § 4-4. All actions taken by the town board in connection with the budget process must be taken at either a regular or special meeting of the board.

§ 4-14. Submission of Estimates. Pursuant to Town Law § 104, the head of each administrative unit must submit an estimate of revenues and expenditures of such administrative unit for the upcoming fiscal year to the budget officer on or before September 20 (October 20). If the head of an administrative unit fails to submit the required estimates by that date, the budget officer prepares the estimates for

that unit. The forms utilized to prepare the estimates are determined and put forth by the budget officer.

§ 4-15. Tentative Budget.

A. Review of estimates by budget officer. After estimates are submitted, Town Law § 106 requires the budget officer to review the estimates. He or she may require the head of any unit to furnish additional information and answer relevant questions.

B. Required items. The budget officer then prepares the tentative budget and includes his or her recommendations. The tentative budget must show by funds:

1. Proposed appropriations and estimated revenues;

2. Estimated fund balances;

3. The amount of taxes to be levied;

4. Salaries of elected officers;

5. Such other information pertinent to the above as prescribed by the state comptroller.

C. Budget message; filing. Budget officers may attach a budget message explaining the main features of the tentative budget and include any additional information they deem advisable. On or before September 30 (October 30), they must file in the town clerk's office the tentative budget with the budget message, if any, and the estimates and schedules.

D. Presentation to and review by town board. The town clerk is required to present the tentative budget to the town board at a regular or special meeting held on or before October 5 (November 10). As a practical matter,

board members may already have received a copy of the budget from the supervisor, since many opt to release the budget to the press at the same time it is filed with the town clerk.

1. The town board may call upon the budget officer and the head of any administrative unit to discuss the tentative budget and the estimates as originally submitted. Additionally, the head of any administrative unit may request, in writing, that he or she be permitted to explain his or her estimates to the town board.

2. The board then reviews the tentative budget and may make any changes, alterations and revisions it considers advisable that are not inconsistent with law. Upon completion of the review, the tentative budget, as modified by the town board, becomes the preliminary budget and must be filed in the town clerk's office. The town clerk reproduces as many copies of it for public distribution as the town board directs.

§ 4-16. Preliminary Budget.

A. Required items. Town Law § 107 requires the preliminary budget be in the form prescribed by the state comptroller and, like the tentative budget, must show by funds:

1. Proposed appropriations and estimated revenues classified as prescribed by the Uniform System of Accounts for Towns;

2. Estimated fund balances;

3. Taxes to be levied;

4. Salaries of elected officials;

5. Any other pertinent information prescribed by the state comptroller.

B. Contingencies. The budget may contain an appropriation for contingencies in both town-wide and town-outside-village funds. A contingent appropriation may not exceed 10 percent of total appropriations, less the amount for debt service and judgments, estimates for special district purposes and for the repair and improvement of town highways.

C. Highway funds. Amounts to be raised for highway purposes must be within the limitations of Highway Law § 271.

D. Additional information. The preliminary budget shall include any other data that the town board may require.

§ 4-17. Fire District Budgets. The boards of fire commissioners must file their estimates with the budget officer on or by November 7. Pursuant to Town Law § 105, the fire district budget must be in the same format as the town budget. The budget officer must affix the fire district budget to the annual town budget. The town board and the budget officer may not alter or change the fire district budget.

§ 4-18. Public Hearing.

A. Public hearing required. Town Law § 108 sets forth that the town board must hold a public hearing on the preliminary budget on or before the Thursday following the November general election (December 10).

B. Notice.

1. A notice of the public hearing must be published in the town's official newspaper, or if none has been

designated, in any newspaper having general circulation in the town. At least five days must elapse between the first publication of notice and the date specified for the public hearing. The town board may, by resolution, require additional publications of the notice of hearing.

2. The notice must state:

(a) The time and place the hearing will be held;

(b) The purpose of the hearing;

(c) That a copy of the preliminary budget is available at the town clerk's office, where it may be inspected during office hours; and

(d) The proposed salary for each member of the town board, an elected town clerk and an elected town highway superintendent.

3. At least five days before the day designated for the public hearing, a copy of the notice must be posted on the signboard of the town.

C. Adjournment. The hearing may be adjourned, but not beyond November 15 (December 15).

D. Public participation. Members of the public must be allowed to comment at the public hearing, and any person may be heard in favor of or against the preliminary budget or any item in it.

§ 4-19. Final Revision and Adoption of Budget.

A. After the public hearing, Town Law § 109 provides that the town board may alter and revise the preliminary budget, subject to the restrictions of Town Law § 107 (i.e., must be in the prescribed form, appropriations for

contingent purposes must be within the 10 percent limitations, and taxes for highway purposes must be within the limitations of Highway Law § 271).

B. The budget must be adopted by November 20 (December 20) and be recorded in the minutes of the town board. It then becomes the annual budget of the town for the next fiscal year. If the town board fails to adopt a budget by November 20 (December 20), the preliminary budget, with such changes as the town board may have made, will constitute the budget for the ensuing fiscal year.

§ 4-20. Tax Levy. Pursuant to Town Law § 115, the town clerk is required to prepare and certify in duplicate the annual budget as adopted by the town board, together with the annual budget of each fire district located within the town, as well as the estimates, if any, for special improvement districts. Within five days from the date the budget is adopted by the town board, the clerk is required to deliver two copies to the supervisor. The supervisor must present such copies to the county legislature or the county board of supervisors within 10 days after receipt thereof from the clerk, for levy with county taxes.

§ 4-21. Benefit Districts. Budgets for special improvement districts are prepared at the same time as the general town budget. An exception to this exists in the case of special improvement districts organized on a benefit basis, in which case the town board (or commissioners if the district is operated by a separate board of commissioners) prepares detailed budget estimates for maintaining these districts for the ensuing year.

A. Preparation of assessment roll. After these estimates are prepared, the town board or the commissioners assess the costs against the real property in the district benefited in proportion to the benefits it determines each will derive, and then prepares an

assessment roll listing the properties, their owners and the assessment so levied on each. Note that no assessment roll is required in Westchester County if the anticipated expenditures do not exceed $500.

B. Filing of estimates and assessment roll; public hearing. The estimates and assessment roll are filed by the town board with the town clerk between September 1 and 15 each year. Thereafter, the town board must hold a public hearing regarding the assessment roll (see Town Law § 239). Notice of such hearing must be published at least 10 and not more than 20 days before the date specified for the hearing.

C. Objections. The town board must meet at the time and place so specified and consider any objections to the assessment roll. It may change or amend the same, or may annul the same and prepare a new roll. If a new roll is prepared, notice must be given of a new public hearing. Notice must also be mailed to each property owner, apprising them of the hearing.

D. Adoption of assessment roll; filing. The assessment roll must be adopted (whether amended, changed or prepared anew) at least 30 days before the annual meeting of the board of supervisors (or county legislative body) at which taxes are levied in the county (see Town Law § 202-a [5]). Once adopted, it must be filed in the office of the town clerk. The town clerk prepares and certifies duplicate copies at the same time he or she performs this duty in connection with the annual budget, to be filed in the clerk's office and delivered to the supervisor. The supervisor must deliver the roll to the board of supervisors (or the county legislative body) along with the annual budget, for levy of taxes against the properties benefited.

§ 4-22. Appropriations and Transfers.

A. **Supplemental appropriations.**

1. During the fiscal year, the town board may, by resolution, make supplemental appropriations from unexpended balances of other appropriations, from an appropriation for contingencies, from unanticipated revenues or from unappropriated cash surplus within a fund, or from borrowings pursuant to the provisions of the Local Finance Law. However, unanticipated revenues or unappropriated cash surplus may be used only to the extent that the total of all revenues of a fund, together with cash surplus, exceeds the total of all revenues and appropriated cash surplus as estimated in the budget (see Town Law § 112).

2. The town board may direct the supervisor to pay to the county treasurer monies from any source (except borrowings) not otherwise committed or appropriated to reduce the levy for county purposes. Such monies must be paid to the county treasurer prior to the levy of taxes.

3. State and federal aid and gifts that are required to be expended for a particular object or purpose, and insurance recoveries received for the loss, theft, damage or destruction of real or personal property, may be appropriated by the town board by resolution at any time for such objects or purposes.

B. Transfers (Town Law § 113 and Highway Law § 285-a).

1. The town board may, by resolution, transfer surplus monies, contingent appropriations and

unexpended balances as follows:

(a) From General Fund, Town-Wide to any of the highway funds or accounts for which taxes are levied on the entire area of the town; and

(b) From General Fund, Town-Outside-Villages to any of the highway funds for which taxes are levied solely on the area of the town outside villages; and

(c) Between highway fund accounts authorized by Highway Law § 141, except for a town that has exempted villages from taxes for Items 3 and 4 (machinery and snow removal).

2. There is no authority for the transfer of funds from any item in the highway fund to the town general fund.

C. Encumbering appropriations. Each department head is required to file a list of unpaid obligations with the supervisor at the close of the fiscal year. In turn, the supervisor is required to encumber the applicable appropriation account balances to the extent the obligations are unpaid. The town board may require the encumbering of appropriation accounts at more frequent intervals (see Town Law § 110).

D. Lapse of appropriations. Balances of appropriations which are not encumbered lapse at the close of the fiscal year, except that an appropriation for a capital purpose continues in force until the purpose for which it was made has been accomplished or abandoned (see Town Law § 111).

ARTICLE IV. Compensation of Officers and Employees.

§ 4-23. Notice of Amounts; Increases. Salaries of the supervisor and town board members, an elected town clerk and an elected town superintendent must be set forth in the notice of public hearing on the preliminary budget. Those salaries cannot be set at an amount greater than that which appears in the notice. However, the town board may increase these salaries once during the year by adopting a local law subject to permissive referendum pursuant to the Municipal Home Rule Law. It should be noted that the salaries listed in the notice of public hearing on the preliminary budget may be fixed at lesser amounts than those listed, so long as the elected official's salary is not reduced during his or her term of office. The salaries of town officers and employees generally may not be fixed at or increased to an amount greater than the amount appropriated for such purpose (see Town Law § 117). The proposed salaries of town justices, tax collectors and receivers, a town attorney, a town engineer, an appointed town clerk or an appointed town superintendent of highways are not required to be specified in the notice of public hearing.

§ 4-24. Salaries. The budgetary provision for salaries of town officers does not of itself establish these salaries at the amounts set forth in the annual budget. Additional town board action is required to fix these salaries.

> **A. Establishment; modification.** Salaries of town officers (elective and appointive) and of employees and their pay periods are fixed each year by resolution of the town board at its organizational meeting at the first of the year. Town Law provides that these salaries may be fixed "from time to time," which means that the town board may increase or decrease salaries throughout the year, subject to the limitations discussed below (see Town Law § 27 [1]). Should the town wish to make a

salary adjustment during the fiscal year, it is recommended to contact the town attorney to discuss the legalities involved.

B. Yearly changes. Under the budget system, salaries of town officers can be altered from one fiscal year to the next. However, it is important to note that:

1. Town justices' salaries cannot be reduced during their terms of office.

2. In several other instances involving substantial reductions in the salaries of elected officials at the beginning of a term, the town board cannot arbitrarily reduce salaries when the effect may be to discourage one from taking office or continuing to hold town office.

3. The town may reduce an elected official's salary (not including the town justice) during their term of office only by enacting a local law that is subject to mandatory referendum.

C. **Specific salaries.**

1. Town justices. The town board may fix the salary of one justice at a larger amount than that of the other, although there must be a rational basis for doing so.

2. Town councilmembers or assessors. There is no provision in the town law for fixing the salaries of town councilmembers or assessors (where elected assessors have been retained) in different amounts, except the salary of the chairman of the board of assessors may be in an amount greater than that of the other assessors. However, the state comptroller has opined that the town board may fix a higher salary for a board member based on additional duties assigned for that office.

3. Police department. In towns in which no police department has been established, the town board may compensate its constables and special policemen:

(a) By a fixed salary for all services, requiring such officers to turn over to the supervisor all fees, per diem or other compensation received by them from any source; or

(b) It may permit such constables and special policemen to retain fees and other compensation for services rendered by them in civil actions and proceedings only, and fix their salaries for all other services.

4. Registrar of vital statistics. The town board may fix a salary for the office of registrar of vital statistics, or it may provide that the compensation for such office shall be the fees authorized under the Public Health Law.

5. Dog control officer. A dog control officer is compensated on a salary basis fixed by the town board.

6. Budget officer. The budget officer may receive, in addition to any other compensation, a salary as budget officer.

D. **Fees excluded from salary.** Aside from the exceptions noted above, the compensation of all town officers is by salary, and that salary "shall be in lieu of all fees, charges or compensation for all services rendered to the town or any district or subdivision thereof" (see Town Law § 27). Any fees or monies received by a town officer or employee shall be the property of the town and paid over to the supervisor, except such fees and monies

the application of which is otherwise provided by law.

ARTICLE V. Accounting.

§ 4-25. Duties of Supervisor (Town Law § 125).

A. **Duties enumerated.** The supervisor shall:

1. Keep his or her records in the manner and form prescribed by the state comptroller;

2. Show on every check the fund against which it is drawn and the appropriation chargeable;

3. Not permit any fund or appropriation to become overdrawn nor charge one fund or appropriation to pay a claim chargeable to another;

4. Pay out money only upon warrant, order or draft of the town clerk after audit and allowance of the town board, unless there is a town comptroller. Where there is a town comptroller, the supervisor shall pay out money only upon warrant, order or draft of the town comptroller.

B. **Payment without prior audit.** The supervisor, without prior audit, may pay principal and interest on indebtedness; salaries of officers or employees; and amounts due on contracts for periods exceeding one year. Note that the town board may, by resolution, also authorize the payment in advance of audit of claims for public utility services such as gas, electric, water, sewer, fuel oil and telephone services, as well as for postage, freight and express charges (see Town Law § 118 [2]). Claims for these payments shall be presented at the next regular meeting for audit.

C. **Monthly statement required.** At the end of each month, the supervisor must provide the town board with

a detailed statement of all money received and disbursed for such month, and must file a copy in the office of the town clerk.

§ 4-26. Comptroller as Accounting Officer (Town Law § 124).

A. In a town where the office of town comptroller has been established and a comptroller has been appointed, the town board may determine by resolution that he or she shall be the accounting officer and the accounting duties of the supervisor shall be transferred to and performed by the comptroller. (Although the supervisor is not relieved of his or her duties as treasurer of the town, he or she may pay out town monies only upon warrant of the town comptroller, and every officer required to submit a monthly statement to the supervisor pursuant to Town Law § 27 must furnish a copy to the town comptroller.)

B. **Record and reporting requirements.**

1. The town comptroller, as accounting officer, shall:

(a) Keep detailed accounting records.

(b) Render a detailed monthly report to the town board of all receipts and disbursements and file a copy in the town clerk's office.

(c) Prepare and file with the town clerk by January 31 each year an annual financial report of the monies received and disbursed, with bank certifications showing the amount of money on deposit and publish a copy of the report in the official newspaper.

2. In lieu of preparing the report as described above, within 60 days after the close of the fiscal year, the

town comptroller may file with the town clerk a copy of the annual financial report to the state comptroller.

3. Within 10 days after receipt thereof, the town clerk shall publish in the official newspaper and in such other newspapers as the town board may direct, either a summary of such report or a notice that the report is available in the town clerk's office for public inspection and copying (see Town Law § 29 [10-a]).

C. Additional responsibilities. In addition to the above, the town board may also provide (by ordinance or local law) that either or both of the following powers and duties of the supervisor shall fall upon the town comptroller:

1. Keeping appropriation accounts and preventing overdrafts;

2. Drawing upon funds and appropriations, provided checks are countersigned by the supervisor.

D. **Assistance to supervisor.** Town Law § 34 (2) provides that the comptroller must provide the supervisor with any information and data necessary to enable the supervisor to perform his or her duties.

ARTICLE VI. Claims and Payments.

§ 4-27. Claims (Town Law § 118).

A. **Proper town charges.** After its adoption, the annual town budget is the financial yardstick of the town for the ensuing year. As previously discussed, the functions of the town must be carried on within the appropriations made in such budget, and the town officers are held strictly accountable in this respect. The purposes for which this money can be spent are only those specified

by law or those necessary to carry out a legal power or duty of the board. Such expenditures are often referred to as proper town charges, and as will be seen later, the town board, in its audit of claims against the town, must, before authorizing payment, determine whether such claims represent proper town charges.

B. **Itemized vouchers required.** No claim shall be paid unless an itemized voucher in the form prescribed by the town board, or the town comptroller, shall have been presented to the town board and shall have been audited and allowed. Vouchers shall be accompanied by a statement by the officer whose actions gave rise or origin to the claim that the officer approves the claim and that the service was actually rendered or supplies or equipment actually delivered. The town board may require by resolution that vouchers be certified or verified.

C. **Utility bills**. If a utility bill contains a net and a gross amount when payment is made after a specified date, the town board should consider authorizing advance payment. When payment is made after the net date, the town is liable for the gross amount even if the net payment date is less than 30 days from receipt of the bill.

§ 4-28. Audit of Claims (Town Law § 119).

A. **Town board audit.** In a town in which there is no comptroller, claims presented for audit should be numbered consecutively by the town clerk and should be available for public inspection at all times during office hours. The town board is not required to audit any claim until 30 days after presentation to the town clerk. As a practical matter, the board generally audits claims at the same meeting at which they are presented.

1. In considering a claim, the town board may require the person presenting it to give evidence under oath

as to the justness and accuracy of the claim and may subpoena witnesses to give evidence regarding the claim.

2. After audit, the town clerk must file the claims in the clerk's office in numerical order. He or she must prepare an abstract of audited claims, listing for each: the number, name of the claimant, amount allowed and the fund and appropriation account chargeable. The abstract includes a warrant authorizing and directing the supervisor to pay to the claimants the amounts allowed.

3. No warrant shall be drawn against a fund or appropriation account to pay claims chargeable to another.

B. Role of town clerk. The statutory duties of a town clerk relative to the audit of town claims may be transferred to another town official only by local law subject to mandatory referendum. Ministerial pre-audit functions, such as checking for mathematical accuracy, may be delegated by town board resolution to a town official other than the clerk.

C. Town comptroller audit. In a town in which there is a comptroller, all of the duties and powers listed above for the town clerk and the town board are performed by the comptroller. The comptroller is required to keep a separate account for each budget appropriation. He or she may not allow any fund or appropriation account to be overdrawn or draw against one fund or appropriation account to pay a claim chargeable to another fund or appropriation account.

D. Form of claim. Town Law § 118 requires that each claim against the town that is subject to audit shall be made by a voucher in a form prescribed by the town board or town comptroller. As mentioned previously, the

voucher must be approved by the town officer who incurred the obligation. If required by town board resolution, it must be certified (or verified) to be true and correct by or on behalf of the claimant. Additionally, each claim must be itemized.

1. The degree of itemization of a voucher should be sufficient to permit intelligent examination and understanding of the transaction for which the claim is made.

(a) At a minimum, the following information should be shown:

1) The date the expense was incurred;

2) A description of the nature of each item so that its legality is apparent; and

3) The amount.

(b) It is incumbent upon those making charges against a town to make plain that such charge was authorized by law. For example, it is recommended that whenever possible, paid bills, in relation to town officer or employee expense accounts, be attached to vouchers.

§ 4-29. Payments by Credit Card. Pursuant to General Municipal Law § 5, the town has the authority to, by local law, ordinance or resolution, enter into agreements with financing agencies or card issuers to allow for the acceptance of credit cards as a means of payment for obligations owed to the town. The town is permitted to charge a fee for the use of a credit card, although such fee may not exceed the costs incurred by the town in allowing for the payment by credit card.

§ 4-30. Online Payments, Electronic Transactions / Banking. General Municipal Law § 5-b authorizes towns to accept certain payments via the town's website or the website of a third-party vendor that has contracted with the town to receive such payments on its behalf. Such payments may be collected "in a manner and condition" defined by the town, but any method of payment must comply with the State Technology Law (particularly governing the use of electronic signatures and protection of personal privacy). At a minimum, the method used to receive Internet payments must authenticate the identity of the sender, ensure the security of the information transmitted and provide a confirmation page to the taxpayer (if the online transaction is for the payment of taxes). The town must ensure that any user's information is secure when providing for online payments.

Additionally, General Municipal Law § 5-a authorizes certain officers of local government to disburse or transfer by electronic means any funds that they are authorized to disburse or transfer by conventional means. So, any funds that can be disbursed by check may also be disbursed electronically. The electronic disbursements or transfers are subject to the same rules that would apply to all other disbursements or transfers, in addition to the following rules:

1. The town board must enter into a written agreement with the bank or trust company where the funds have been deposited. The written agreement must prescribe: the manner in which the electronic transfers will be accomplished; identify the number and names of the accounts involved; identify the officers who are authorized to make such transfers; and implement a security procedure in accordance with the Uniform Commercial Code (see N.Y. UCC § 4-A-201). A

security procedure under this provision of the UCC is a "[p]rocedure established by agreement of a customer and a receiving bank for purposes of (1) verifying that a payment order or communication amending or canceling a payment order is that of the customer, or (2) detecting error in the transmission or content of the payment order or communication." It is important to note that a mere comparison of signatures alone does not constitute a "security procedure" under this provision.

2. The bank or trust company processing the transfer must provide to the officer ordering the electronic transfer or disbursement written confirmation of each transaction no later than the business day after the business day on which the transaction was made.

3. Finally, it is the duty of the town board to develop internal controls for reporting and documenting all electronic transactions.

ARTICLE VII. Payrolls.

§ 4-31. Certification or Verification. Town Law § 120 requires that all payrolls or other claims for compensation for personal services shall be certified by the person having supervision of the claimant, unless the town board determines by resolution that such payrolls and claims must be verified. Certification is a much simpler procedure than verification and merely requires the signature of the official possessing knowledge of the facts below the certification statement. A verification, on the other hand, must be notarized after execution by the town official. There are significant consequences if any officer knowingly submits a payroll or claim containing false information. Penal Law §§ 175.30 and 175.35 provide as follows:

> ***§ 175.30 Offering a false instrument for filing in the second degree.*** *A person is guilty of offering a false instrument for filing in the second degree when knowing that a written instrument contains a false statement or false information, he offers or presents it to a public office or public servant with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant.*
>
> *Offering a false instrument for filing in the second degree is a class A misdemeanor.*
>
> ***§ 175.35 Offering a false instrument for filing in the first degree.***
> *A person is guilty of offering a false instrument for filing in the first degree when, knowing that a written instrument contains a false statement or false information, and with intent to defraud the state or any political subdivision thereof, he offers or presents it to a public office or public servant with the knowledge or belief that it will be filed with, registered or*

recorded in or otherwise become a part of the records of such public office or public servant.

Offering a false instrument for filing in the first degree is a class E felony.

ARTICLE VIII. Petty Cash Funds.

§ 4-32. Purpose. Pursuant to Town Law § 64 (1-a), town boards may, by resolution, establish petty cash funds for town officers, heads of departments or offices in the town for:

A. The payment, in advance of audit, of properly itemized and verified or certified bills for materials, supplies or services furnished to the town for the conduct of its affairs, which materials and supplies must be paid for on delivery; and

B. The purpose of making change when required in the performance of official duties.

§ 4-33. Amount. The amount of a petty cash fund for a receiver of taxes and assessments in a town of the first class shall not exceed $1,000, and shall not exceed $500 for any other officer or office or department head. Of course, a town board may create such a fund in any lesser amount if it sees fit, depending on the size of the town and the complexities of the office. It may also increase such amounts by adoption of a local law under its home rule authority.

§ 4-34. Setup and Use. Upon the adoption of the appropriate resolution creating a petty cash fund, the supervisor would draw a check payable to the respective officer for the full amount of the fund as so created. The town officer would then cash the check into the currency denomination needed and place the same in a cash box or cash register in his or her office.

A. If the petty cash fund is used only for the purpose of making change, it should always total the authorized amount.

B. If the petty cash fund is used for paying for small purchases or items for which payment is due on delivery, it will diminish in cash amount and will have to be replenished as described below.

C. When a payment from a petty cash fund is made, evidence or proof that the payment was actually made is required. The law provides that at the time any payment is made from a petty cash fund, "a bill in form sufficient for audit by the town board as required by law" shall be required to be furnished to the officer for whom the fund was created. The phrase "as required by law" refers to Town Law § 118. The law requires the bill be itemized and certified (or, if the town board has so determined by resolution, verified).

§ 4-35. Claims for Reimbursement. The law requires each town officer for whom a petty cash fund has been created to make a claim for reimbursement at each town board meeting.

A. Form; contents; reimbursement. The claim is made on a regular town claim form. It should list all the expenditures made since the last meeting of the board. All the bills that were received when these expenditures were made should be attached to the claim. After the town board has audited and allowed the claim, it will direct the supervisor to reimburse the petty cash fund from the appropriate budgetary items. To this extent, the petty cash fund is a revolving, continuous fund.

B. **Refused claims.** If the town board refuses to audit or allow any such expenditures from the petty cash fund, they become the personal liability of the town officer and must be paid out of his or her own pocket. If the officer

does not reimburse the petty cash fund for such disallowances, amounts shall be withheld from his or her salary and paid into the petty cash fund until it is completely reimbursed.

C. **Cash book.** Some town officers find it necessary to keep a cash-book record of expenditures from petty cash. This is particularly desirable in the case of a large petty cash fund from which many payments are made. The cash book leaves town officers with a record after they have submitted their claims for reimbursement with all of the bills attached. There is always the possibility that one of the supporting bills may be misplaced or lost, and the cash-book record provides a means of identifying supporting bills and the opportunity to obtain a duplicate.

§ 4-36. Exception in Case of Petty Cash Fund for Tax Collectors in Towns of the Second Class. The life of a petty cash fund in the case of tax collectors in towns of the second class ends prior to the making of their return to the county treasurer at the end of the collecting period. Before making the return to the county treasurer, the collector in a town of the second class must return to the town supervisor the full amount of any petty cash fund established. To do this, the collector should secure full reimbursement from the town board for any expenditures made from the petty cash fund as described above. Upon paying over the full amount of the petty cash fund to the supervisor, the collector should receive a receipt from the supervisor. Once collectors are finished collecting taxes and are ready to make the return of unpaid taxes, they have no further use for a petty cash fund until the start of the next tax collection period. When they again have use for it, the fund can be re-established by town board resolution. By that time, a new collector may be in place. (Note: This same provision does not apply to a receiver of taxes whose collecting duties are on a year-round basis.)

ARTICLE IX. Town Charges.

§ 4-37. Charges Authorized by Statute; Other Authorized Expenses. Generally speaking, proper town charges are either expenditures made pursuant to a specific statutory authority or expenses incurred in the accomplishment of powers or duties given to or imposed upon town boards by statute. Town Law §§ 64 and 116 provide a broad grant of authority for the incurring of proper town charges. Additional authority to incur further charges exists throughout the law. For example, Town Law § 116 authorizes towns to incur expenses for items including compensation and expenses of town officers and employees; damages recovered against a town officer for any act performed in good faith; insurance for loss of public monies through theft; examination of animals for infectious diseases; sobriety tests for drunken driving; independent audit of

town records; fees of court officers; expenses of training schools for town officers and employees; dues for the Association of Towns; publication and distribution of reports of the fiscal affairs of the town; and the purchasing or leasing of labor-saving devices. It is proper to ensure there is statutory authority prior to making a determination that a claim presented or anticipated to be presented is a proper town charge. However, in addition to finding statutory authority, a claim must also have an appropriation for the expenditure for it to be a proper town charge.

§ 4-38. Prohibited Contracts and Expenditures. Unless a provision has been made in the annual budget or a supplemental appropriation has been provided, no officer, board, department or commission may expend, or contract to expend, any money or incur any obligations for any purpose except leases or contracts as may have been entered into by the town for a term exceeding one year. Any contract, either verbal or written, made in violation of this principle will be null and void (see Town Law § 117).

§ 4-39. Judgments. The town board has the authority to pay for any final judgments or for any actions, proceedings or claims that have been compromised or settled against the town pursuant to Town Law § 68 – which grants the board the authority to compromise or settle actions, proceedings or claims – by taxation or by borrowing pursuant to the Local Finance Law (see Town Law § 121).

ARTICLE X. Purchasing and Contracting.

§ 4-40. Competitive Bidding.

A. Public works and purchase contracts, thresholds. General Municipal Law § 103 requires all contracts for public works that exceed $35,000 and all purchase contracts that exceed $20,000 be awarded to either the lowest responsible bidder or the bid that represents the best value (if complying with certain conditions) after

advertising for bids. Generally speaking, a public works contract is a contract that encompasses the provision of services, labor or construction, while a purchase contract applies to the procurement of commodities, materials, equipment and supplies.

B. Town building construction contracts. Town Law § 222 requires the town board to award contracts for the construction, alteration or remodeling of all town buildings to the lowest responsible bidder after advertisement for bids if the project exceeds $35,000.

C. Improvements in special improvement districts. Town Law § 197 requires compliance with General Municipal Law § 103 on contracts involving improvements in special improvement districts that exceed $35,000.

D. Contracts involving both goods and services. When a contract involves the acquisition of both goods and services, such as a commodity that requires installation, the town should look to the total character of the contract to determine where it falls on the competitive bidding spectrum. That is, if the public works component of the contract is minor and the purchase aspect is significant, the town should apply the $20,000 threshold when determining whether the contract is subject to bidding requirements. Conversely, if the purchase component of the contract is minor and the public works aspect is significant, the town should apply the $35,000 threshold.

§ 4-41. Competitive Bidding Procedures. The competitive bidding law sets forth the procedures to follow when going out to bid for purchases or contracts for public works. It is important to comply with the procedures set forth, as any contract awarded in violation of General Municipal Law § 103 will likely be invalidated by the courts, with the town facing liability for damages.

A. Bid solicitation. An advertisement must be published in a town's official newspaper, or if the town does not have an official newspaper, in a newspaper of general circulation throughout the town designated for such purposes. The advertisement must be published at least five days prior to the date of the bid opening. In addition to publication, bid specifications may also be mailed to prospective bidders, so long as it is done in good faith – that is, it should be sent to all known bidders within reasonable limitations.

1. Purchase contracts. The advertisement should contain a fair description of the article to be purchased and state where the particular specifications can be seen and obtained. If, in the case of machinery, for example, the town proposes to trade in an existing piece of equipment, this fact and where this equipment can be seen should be stated.

a) Use of brand names. A town is permitted to list a specific brand name in its product specifications, so long as the brand name listed represents an industry-wide standard and the bid specifications include an equivalency clause. An equivalency clause sets forth that a bid will be accepted if it is the lowest responsible bidder / bidder that represents the best value and provides for either the brand name listed or its reasonable equivalent.

b)Standardization. Under General Municipal Law § 103 (5), a town board may provide for standardization within its bid specifications, wherein it uses a particular brand in its bid specifications, so long as the board has adopted a resolution by three-fifths of the board asserting that, for purposes of efficiency or economy, there is a need for standardization of certain equipment, materials or supplies.

c) Location of bidders. A town may not restrict its invitation to bid on purchase contracts of more than $20,000 to suppliers who reside in the town or whose establishments are within the town boundaries. Where the cost of delivery is involved, the town can provide in the advertisement for bids that the supplier must have a place of business within a radius of a certain number of miles from the delivery point in the town. However, in such cases this radius distance should not be drawn arbitrarily so as to exclude a particular place of business just a short distance beyond the line which was drawn.

d) Used equipment. In advertising for used equipment, among the specifications that may be properly included are: requirements as to condition of the item; requirements as to mileage or time used; a provision that equipment must be produced or marketed not earlier than a particular year; a requirement that the successful bidder furnish a written guarantee that the equipment has been reconditioned and is in good working order; and a provision for a municipal officer or employee to inspect the item (see 17 Opn. St. Comp. 1961, p 135).

2. Public works contracts. The advertisement must describe the project, and where required, specify the divisions of work and state where the specifications can be seen.

a) The Wicks Law. General Municipal Law § 101, commonly referred to as the Wicks Law, sets forth that when a town enters in to a public works contract for the erection, construction, reconstruction or alteration of a building exceeding $1.5 million in Nassau, Suffolk and Westchester counties and $500,000 throughout the rest of the state, the town must prepare separate bid specifications as they relate to:

1. plumbing and gas fitting,
2. heating and cooling systems, and
3. electric wiring.

3. Improvement district projects. The advertisement must describe the project and state that the plans and specifications for the work shall be exhibited publicly in the office of the town clerk, where all who desire to examine the same shall have reasonable opportunity to do so.

B. **Advertisement content**. The time when and the place where the bids will be received, opened and read must be stated in the bid advertisement.

1. Purchases and public works. At least five days must elapse between the date of the advertisement and the opening of the bids. On larger public works jobs, a substantially longer period of time should be allowed to permit prospective bidders time to prepare their bids carefully, although this is not statutorily required.

2. Improvement district projects. There must be at

least 10, and not more than 30, days between the first publication of the advertisement and the opening of bids.

C. Bid submission. All bids must be submitted in sealed envelopes prior to the time specified in the advertisement. Additionally, towns have the authority to accept bids on purchase contracts electronically, as long as the town has adopted a resolution authorizing electronic acceptance. If accepting bids electronically, the advertisement for bids must indicate how the electronic bids will be received (e.g., via the town website or through a certain e-mail address). Of course, the town must still accept written bids, and any electronic bids must comply with Article 3 of the State Technology Law.

D. Bid deposits. While there is no statutory provision requiring bid deposits, it is a good practice to require a bidder to accompany his or her bid with a certified check or bond obligating him to execute the contract if it is awarded to him or her.

1. Purchases and public works. A certified check, money, bonds or other obligations or security deposited to secure a bid shall be retained under the jurisdiction and control of the chief fiscal officer or other officer of the town or district having custody of its money, until returned to the bidder or forfeited (General Municipal Law § 105).

2. Improvement district projects. If the bidder fails to enter into the contract or to give further security as above described, the check deposited shall be forfeited to the town as liquidated damages and the supervisor shall collect the same or enforce payment of the bond.

E. Deposits on plans and specifications. Pursuant to General Municipal Law § 102, the town may require any

person or entity that receives a copy of the plans and specifications from the town to deposit a sum of up to $100, to guarantee the safe return of the plans and specifications. Once the contract is awarded, the town must return the deposits within 30 days to all unsuccessful bidders that return the plans and specifications in good condition.

F. Non-collusive bidding certification. In order to ensure confidentiality of the bidding process, every bid or proposal must contain a statement of non-collusion asserting that the bid prices were arrived at independently, without collusion, the prices were not knowingly disclosed prior to the bid opening and that the bidder did not induce any other person or entity to submit or not submit a bid.

G. Performance security. There is no statutory provision requiring performance bonds in competitive bidding contracts. However, it is recommended that the town require a performance bond guaranteeing the completion of the work be furnished by the successful bidder upon awarding of the contract. If the town does require a performance bond, such information must be included in the advertisement for bids and in the bid specifications.

H. Iran Divestment Act of 2012. General Municipal Law § 103-g now requires every bid made to a local government contain a statement that asserts, under the penalty of perjury, that the bidder is not affiliated with entities invested in the Iranian energy sector. The town may not consider any bids that do not conform with this requirement, although the town may consider a bid that fails to conform if any dealings with the Iranian energy sector occurred prior to 2012 or, alternatively, if a determination is made by the town board in writing that the acquisition of the goods or services are necessary for the town to perform its functions, and such goods or

services are not available from any other source. It is important to ensure that potential bidders are aware of this requirement; to this end, it is recommended to include information in the advertisement for bids that all bids must include the statement of non-investment as required by General Municipal Law § 103-g.

I. Bid opening. The bids must be publicly opened at the time specified and read aloud. The opening and reading of bids is a ministerial act that can be delegated by the awarding body.

J. Award. A contract should be awarded to the lowest responsible bidder furnishing the required security or to the bid that represents the best value, depending upon what the bid specifications set forth. The submission of the lowest bid does not in and of itself create a contractual relationship. A contractual relationship with a bidder is not created until the town actually awards the contract.

1. Purchases and public works. The bid should be awarded to the lowest responsible bidder who complies with the specifications as advertised, or in certain instances, to the bid that represents best value. Whether a bid complies with specifications involves a factual determination by the awarding board or officer, and the courts will generally not upset that determination except where fraud or bad faith are present. A town may decline bids that fail to comply with the literal bid specifications or, alternatively, it may waive a technical noncompliance if it is in the town's best interest. Material variance between specifications and a submitted bid that gives a bidder a substantial, unfair advantage cannot be waived.

a) Selecting lowest responsible bidder. Many factors can enter into the town board's decision

as to who is the lowest responsible bidder and whether or not the bid meets the required specifications. In a leading case on this point, the court held that "the term 'lowest responsible bidder' does not mean one who is only pecuniarily responsible, but one who also possesses moral worth. It implies skill, judgment and integrity, as well as sufficient financial resources." In the absence of a showing to the contrary, it will be assumed that the discretion exercised by the town was exercised with an honest desire to award the contract to the lowest responsible bidder. The question of the actual financial responsibility of the lowest bidder can be taken care of by requiring that a bid bond or other security be furnished with the bid, along with a performance bond guaranteeing the full completion of the contract. If the lowest bidder is not responsible for any of the reasons suggested herein, the contract may be awarded to the next lowest bidder meeting specifications and found to be responsible. If the town board is in doubt as to either of these facts, it should reject all bids and re-advertise.

(i) On the award of a contract to purchase machinery or equipment, the next question to arise is whether a bidder's bid meets the specifications. In these cases, it must be determined whether the bidder has substantially complied with the specifications.

(ii) Where there is some disagreement or argument on the awarding of a contract, the town board should be careful to include in the record the facts and circumstances it considered and a clear statement as to why the lowest bidder did not comply with the

specifications or was not found to be responsible.

(iii) A disqualified bidder is entitled to notice and an opportunity to be heard on the issue of whether the town finds the bidder to be responsible or whether the bidder has complied with the bid specifications.

b) Best value. Pursuant to General Municipal Law Section 103, a municipality may award purchase contracts and contracts for service work on the basis of best value, so long as the municipality has enacted a local law authorizing the utilization of best value in procurement. However, best value may not be utilized for purchase contracts necessary for the completion of a construction contract governed by Article 8 of the Labor Law. Accordingly, any contract for the purchase of a non-construction-related good may be awarded on the basis of best value. Under State Finance Law section 163 (1) (j), best value enables a municipality to award a contract on the basis of the quality, cost and efficiency of the offer, as opposed to solely looking to the lowest responsible bid. Often, the best value will be synonymous with lowest responsible bid. In the instances where the lowest responsible bid may not be the most cost-effective bid, best value offers a municipality greater flexibility to ensure that purchase and service contracts will be carried out in an optimal manner. If the town wishes to award a contract on the basis of best value, the bid specifications must indicate as much.

2. Improvement district projects. The board shall determine the lowest responsible bidder or bidders whose bid and check or bond have been made and

filed in conformity with the law and the published notice, and the contract or contracts shall be awarded to the lowest responsible bidder.

K. Identical or single bids. Where there are identical bids, the town board may award to either bidder or it may reject all bids and re-advertise. If there is a single bid received, the town board may likewise award to this bidder, or, if it is not satisfied with the bid, it may reject it and re-advertise.

L. Bid mistake or error.

1. Where a unilateral error or mistake is discovered by someone who has submitted a bid, such bid may be withdrawn after a showing of all the following:

a. The mistake is known or made known to the town prior to the awarding of the contract or within three days after the opening of the bid, whichever period is shorter;

b. The bid price was based on an error of such magnitude that enforcement would be unconscionable;

c. The bid was submitted in good faith and the bidder submits credible evidence that the mistake was a clerical error as opposed to a judgment error;

d. The error in the bid is actually due to an unintentional and substantial arithmetic error or an unintentional omission of a substantial quantity of work, labor, material or services made directly in the compilation of the bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of the original

work paper, documents or materials used in the preparation of the bid sought to be withdrawn; and

e. It is possible to place the town in status quo ante (i.e., not expose the town to serious prejudice or consequences).

2. The sole remedy for a bid mistake shall be withdrawal of that bid and the return of the bid bond or other security, if any, to the bidder. Thereafter, the town may, in its discretion, award the contract to the next lowest bidder or rebid the contract. Any amendment to or reformation of a bid or contract in order to rectify such an error or mistake is strictly prohibited.

M. Negotiation with bidders. As a general rule, a municipality may not negotiate with a bidder during the bidding process. However, post-bid negotiations with the lowest responsible bidder may occur when: (1) there is no suggestion of favoritism, fraud or corruption; (2) the public interest is advanced through an actual or potential savings on project costs; and (3) there is no material departure from the original specifications and no concessions to the negotiating bidder. A municipality may not engage in post-bid negotiations with a bidder other than the lowest responsible bidder.

N. Award of contract creates binding obligation; change orders. Where a contract is subject to competitive bidding requirements, the award of a contract creates a binding contractual obligation in accordance with the terms of the bid specifications. Thus, as a general proposition, entering into a contract that materially varies from the bid specifications or materially amending an existing contract would constitute, in effect, a material alteration of the specifications after the bidding process and would give the successful bidder an

unfair advantage over other bidders and prospective bidders who did not have the same opportunity. In addition, generally, a contractor may not recover for additional work not contemplated by the original contract unless the additional work itself was subject to competitive bidding (see 16 Op. St. Compt. 1960, p. 265). Nevertheless, it is recognized that, as work goes forward, it is sometimes necessary to make some changes from the initial plan. Where the change relates to details or relatively minor particulars and is merely incidental to the original contract, a change order may be issued without competitive bidding even if the increased cost exceeds the bidding limit. However, no important general change may be made that so varies from the original plan or alters the essential identity or main purpose of the contract as to constitute a new undertaking. For example, the state comptroller has recognized the issuance of change orders without competitive bidding where the existence of unanticipated utility line obstructions was discovered in the course of construction (see Op. St. Compt. No. 80-130) and where it became necessary to cover an increased area under a bus transportation contract due to unanticipated increased school enrollment (see Op. St. Compt. No. 77-24, unreported), among other situations. The dollar amount of the change order, while it might be some evidence of whether a new undertaking is involved, would not necessarily be the conclusive determining factor. The propriety of a change order depends on the surrounding facts and circumstances in each particular instance.

O. Security on improvement district projects. For improvement district projects, the advertisement for bids must contain a provision requiring all bidders to file with their bids a certified check for a sum equal to 5 percent of the estimated expense of the improvement, payable to the supervisor, or a bond with sufficient sureties to be approved by the supervisor, in a sum equal to 5 percent of the estimated expense of the improvement,

conditioned that the bidder will execute such further security as may be required for the faithful performance of the contract.

P. Assignment. General Municipal Law § 109 requires all bid specifications to contain a provision prohibiting the contractor from assigning or otherwise disposing of a contract or of his or her right, title or interest therein without the previous consent, in writing, of the board or officer awarding the contract.

Q. Requirements and market rate contracts. Often, the town may find it necessary to enter into a requirements contract, wherein the town agrees to purchase goods from a vendor, the amount of which is determined on a case-by-case basis, depending upon the town's needs. A requirements contract must contain a minimum and maximum amount of goods to be purchased, so as to ascertain the range of costs. If the purchase threshold of $20,000 is implicated in a 12-month period, the requirements contract is subject to competitive bidding.

Additionally, there are times when the exact cost of a contract cannot be ascertained, as the rate of the commodity purchased is dictated by the market. Since cost cannot be determined, the contract would instead reference the market rate. In this instance, the town may include a market rate requirement in its bid specifications.

§ 4-42. Payment on Public Works Projects.

A. **Prevailing wage.** As a general rule, prevailing wage must be paid in any contract for public work and any building service contract exceeding $1,500. The cost of a public works contract does not matter; even if the competitive bidding thresholds are not triggered, a town must still pay prevailing wage (see Labor Law §§ 220-

227). An exception to the prevailing wage requirement exists if the public works project is completed by a sole proprietor that does not have any employees. The Department of Labor determines the prevailing wage schedule each year, which varies by county. As for building service contracts, any contract that exceeds $1,500 must be paid in accordance with the prevailing wage schedule put forth by the Department of Labor (see Labor Law §§ 230-239-a).

B. **Progress payments on public works projects.** All contracts for public works must contain a clause for making periodic payments by the town to the contractor for work performed or materials furnished in accordance with the schedule of progress payments set forth in the contract and in accordance with the detailed provisions of General Municipal Law § 106-b. The contract must also provide for periodic payments by the contractor to the subcontractor.

C. **Retained percentages.** Where a percentage of progress payments is withheld under a contract as a form of security for the town, the contractor may withdraw the same by substituting therefor U.S. bonds or notes, New York State bonds or notes or bonds or notes of any political subdivision. At the direction of the chief fiscal officer, the bonds and notes can be deposited by the contractor with a designated bank. The town or the bank is required to clip coupons and remit payment to the contractor. The bank or political subdivision may charge a reasonable fee for this service, which may not exceed the amount ordinarily charged for such service by a bank (see General Municipal Law §§ 106, 106-a). General Municipal Law § 106-b places certain limits on the amount which may be retained from each progress payment to a contractor.

§ 4-43. Exceptions to Competitive Bidding. There are certain statutory and common law exceptions to the formal

bidding requirements. The principal ones are as follows:

A. **State contracts.** The town does not have to comply with competitive bidding requirements if it purchases materials, commodities, technologies, equipment, food products or supplies and printed materials in excess of $500 through New York State's Office of General Services (OGS) (see General Municipal Law § 104).

B. County contracts. A town does not have to engage in competitive bidding for contracts for public work if utilizing a county contract, so long as the county contract was let in accordance with competitive bidding laws. Additionally, towns are permitted to procure goods and services from counties without engaging in bidding, so long as the county governing board has adopted rules and regulations regarding the terms and conditions under which such procurements may be made (see County Law §408-a, General Municipal Law § 103 [3]).

C. Federal contracts. Towns are permitted to purchase off of federal General Services Administration (GSA) contracts for information technology and telecommunications hardware, software and professional services and law enforcement contracts (see General Municipal Law § 103 [1] [b]). Additionally, the town may purchase certain materials from GSA related to natural disasters as part of a disaster preparedness plan, as well as materials related to counter drug, homeland security and emergency response activities.

D. **Other government contracts.** General Municipal Law § 103 (16) permits local governments to purchase apparatus, materials, equipment, and supplies and to contract for additional services related to those supplies, off of any local, state or federal government contract, so long as the contract was let in a manner that is consistent with the competitive bidding laws and has been made available to other governmental entities.

E. **Emergencies.** If the purchase or work is required by virtue of a public emergency arising out of an accident or other unforeseen occurrence, the town does not have to comply with competitive bidding requirements. A carefully drawn resolution, clearly establishing the facts that bring the emergency within this exception, should be adopted by the town board prior to the purchase or the letting of the work (see General Municipal Law § 103 [4]).

F. **Professional services.** Contracts for professional services or those requiring special or technical skill, training or expertise are exempt from competitive bidding requirements. Some factors to consider when determining whether a service falls within the professional services exception include:

1. Whether the services are subject to state licensing or testing requirements;

2. Whether substantial formal education or training is a necessary prerequisite to the performance of the services; and

3. Whether the services require a personal relationship between the individual and municipal officials.

G. Sole source. Where the subject of the contract is controlled by a sole source so that there is no possibility of competition, a monopolistic situation exists, and the courts do not require local governments to engage in competitive bidding.

H. Surplus and secondhand supplies, materials and equipment. A town does not have to engage in competitive bidding for purchases of surplus or secondhand supplies, materials or equipment from the

federal government, the State of New York or from any other political subdivision, district or public benefit corporation (see General Municipal Law § 103 [6]).

I. Leases, licenses and concessions. Leases are not purchases, and thus, a true lease is not subject to General Municipal Law § 103. Towns should be careful that an agreement with a vendor is not cast in terms of a "lease" when the substance of the contract is really a purchase.

The substance of the agreement will prevail over its form. Lease-purchase arrangements as authorized by General Municipal Law § 109-b (see § 4-58) must be competitively bid.

Additionally, licenses and concessions are not subject to competitive bidding, as they do not involve the expenditure of municipal funds.

J. State agency contracts. A town does not have to engage in competitive bidding and directly enter into a contract with any state agency (see General Municipal Law § 99-r).

§ 4-44. Procurement Policies. If the town is making a purchase or entering into a public works project that does not trigger the competitive bidding thresholds, the town must still comply with the intent and spirit of competitive bidding through its procurement policy. General Municipal Law § 104-b requires goods and services not required to be competitively bid to be procured in a manner "so as to assure the prudent and economical use of public monies." To reach that objective, town boards, by resolution, "shall adopt internal policies and procedures governing all procurements not required to be made pursuant to the competitive bidding requirements" of General Municipal Law § 103. The town board must solicit comments on its procurement policy and procedures from any of its officers involved in the procurement process, such as the superintendent of

highways and purchasing director. The policies are to be reviewed annually. Each town should carefully consider its own particular circumstances in developing its procurement policy.

ARTICLE XI. Annual Accounting.

§ 4-45. Required Statements, Books and Records for Examination by Town Board. On or before January 20, all town officers and employees that received or disbursed any moneys in the previous fiscal year must file detailed statements of all such receipts and disbursements, and additionally, must produce all pertinent books and records for audit by the town board. However, the town justice is not required to file a statement showing receipts and disbursements. The statements must be recorded in the minutes. On the same day, the town justices must produce their dockets for examination by the town board (see Town Law § 123).

§ 4-46. Exception to Audit Requirement. The requirement for an annual audit does not apply to towns having a town comptroller or towns that, prior to January 20, engage the services of a certified public accountant or public accountant to make an annual audit to be completed within 60 days after the close of the town's fiscal year (see Town Law §§ 62 and 123).

ARTICLE XII. Borrowing.

§ 4-47. Sale of Municipal Obligations.

A. **Budget considerations.** Town boards sometimes find themselves in a position where a proposed purchase or contract for public works is too costly to be fully paid for from a single year's budget. Under certain circumstances, such purchases or contracts may be financed by the sale of town obligations, with the cost thereby spread over a period of years. If this occurs, the budgets of

subsequent years must include revenue to pay the principal and interest charges of the obligation each year until the obligation is paid off.

B. **Other considerations.** There are several factors to consider when contemplating the sale of municipal obligations. The subject matter is complex and technical, and it is recommended that the town consult with its municipal attorney or bond counsel to assist in drafting the necessary resolutions, certificates, notices and note or bond forms, among other things. Note that the financing described in the following sections is merely an overview; a much more in-depth analysis is often necessary to understand the complexities of the Local Finance Law. Some questions to consider:

1. What type of obligation will be issued?

2. For how long a period can they be issued? The various items that a town needs to purchase and the different types of public works projects they need to undertake have, under the law, varying "periods of probable usefulness," which determine the time within which the obligation must be paid.

3. Does the town have the authority to issue obligations to finance the desired object?

4. Would the proposed sale of obligations be within the town's debt limitation?

5. Can the obligations be sold at private sale, or must a public sale be held?

6. Would a down payment be required?

7. Is a referendum required?

ARTICLE XIII. Capital Improvements.

§ 4-48. Financing Capital Improvements. Towns generally finance capital improvements through the issuance of certain obligations, including capital notes, bonds and / or bond anticipation notes. In issuing any of these obligations, it is important to ask the following questions:

A. Does the project (considered an "object or purpose" under the Local Finance Law) being financed constitute a proper town purpose?

B. Does the particular object or purpose to be financed have a period of probable usefulness assigned to it by Local Finance Law?

C. Does the proposed object or purpose plus the town's outstanding debt comply with the town's constitutional debt limit? Article VIII, Section 4 of the New York State Constitution provides that a town's indebtedness may not exceed 7 percent of the five-year average full valuation of the taxable real estate in the town. This is computed by taking the last completed assessment roll and the four preceding rolls, applying the equalization rate to each as determined by the Department of Taxation and Finance and then dividing the result by five. It should be noted that few, if any, towns have debt limit concerns.

D. Does the law require the particular object or purpose to be financed from current funds or by current appropriation rather than by the issuance of obligations?

§ 4-49. Capital Notes. The capital note is a method of financing any public improvement for which bonds could be issued, assuming the town can afford to pay the principal amount over a period of two years. It should be noted that capital notes are rarely utilized as a financing method, given

the other options available to local governments.

A. Maturity. The maximum maturity of a capital note is two years from the date of issue. At least half of the total amount of the capital note must be paid in the first fiscal year succeeding the fiscal year in which the note was issued, unless authorized and issued in a fiscal year subsequent to the adoption of the budget for the next fiscal year. The requirement for maturity by the second fiscal year that succeeds the year in which the note was issued still applies.

B. Sale. Capital notes can be sold at private sale, at not less than par, without any public bidding. No referendum, mandatory or permissive, is required. A two-thirds vote of the town board is required for the adoption of a capital note resolution, but a majority vote is sufficient to authorize the renewal of a capital note.

C. Redemption. Capital notes must be redeemed out of taxes and assessments levied or to be levied for the fiscal year in which the notes mature or, additionally, may be redeemed from revenues derived from that fiscal year (such as sales tax revenue).

D. Issuance for more than one purpose. Local Finance Law § 31.00 (d) provides that the issuance of serial bonds or capital notes for two or more specific objects or purposes (or classes of objects or purposes) may be authorized by a single bond or capital note resolution when the period of probable usefulness is less than five years, or where the resolution would not be subject to either a mandatory or permissive referendum.

§ 4-50. Bonds and Serial Bonds.

A. Advantages. Financing public improvements through bonds or serial bonds provides towns with more time to pay the cost of the capital improvements. Serial bonds

are among the most common debt obligations issued by local governments

B. Purpose of serial bonds. Serial bonds are typically utilized to either: 1) redeem outstanding Bond Anticipation Notes or Bond Anticipation Renewal Notes; 2) pay the cost of all or a portion of a capital project; or 3) a combination of redemption and capital project costs.

C. Payments and maturity. Generally speaking, annual principal payments must be made on serial bonds. However, the first principal payment on a serial bond need not be made until the second anniversary of the first borrowing; this functions to require a local government to make a principal payment within two years from the date the serial bond is issued. All payments must be made pursuant to an annual appropriation by the town board.

Serial bonds, as their name suggests, mature sequentially: one follows the other, in their stated principal amounts, on a yearly basis until the final maturity date. The maximum maturities of bonds cannot exceed the period of probable usefulness assigned to the particular object or purpose by Local Finance Law § 11.00, computed from the date of the bonds or the date of the first bond anticipation note, whichever is earlier. Furthermore, no annual installment of serial bonds shall be more than 50 percent in excess of the smallest prior installment (see Local Finance Law § 21.00 [d]).

D. Adoption by town board; referendum requirements.

1. A town board resolution authorizing the issuance of bonds must be adopted by a two-thirds vote of the entire board, unless the bond resolution is subject to a mandatory referendum, in which case, a majority vote of the board is sufficient.

2. All bond issues of a town are subject to a permissive referendum except:

a) Bonds with a proposed maturity of not more than five years;

b) Bonds for any district or special improvement authorized by Town Law Article 3-A (suburban towns), Articles 12 or 12-A (special districts), Article 12-C (sewer or water improvements); or for any such improvement authorized by any other general or special law where the cost is to be assessed on benefited real property;

c) Bonds for street or highway improvements where part of the cost is paid by the county or state pursuant to the Highway Law, or is to be levied against property within any village within the town (Local Finance Law § 35.00);

d) Bonds for the payment of judgments or compromised or settled claims.

3. Bond resolutions authorizing bonds for highway improvements not exceeding $15,000 in any one year are not subject to any referendum (permissive or mandatory) if the maturities are not to exceed five years.

4. Bond resolutions to finance street and sidewalk improvements under Town Law §§ 200 and 200-a are also exempt from the referendum requirement.

E. **Amount of cost to be covered by bonds.** Generally only 95 percent of the total estimated cost can be handled by the issuance of bonds. The other 5 percent must be made by a so-called "down payment," which can either be made available from current funds or by the

issuance of capital notes. There are certain exceptions to the down payment rule where the down payment rule is not applicable, the two most common being:

1. Where the bonds have a maximum period not exceeding one-half of the maximum period prescribed by law; or

2. Where the bonds are issued for a purpose that has a period of probable usefulness of five years or less pursuant to Local Finance Law § 11.00.

F. **Sale.** Bonds may be sold at public or private sale, although there are restrictions in place if the amount exceeds $1 million. Should the bond issue exceed $1 million, it must be sold publicly and competitively, in compliance with Local Finance Law and the regulations put forth by the New York State Comptroller. The sale of bonds at private sale is permitted in the case of issues not exceeding $1 million or where the sale is to the U.S. Government, the NY Municipal Bond Bank, or the NYS Environmental Facilities Corporation. The total amount of bonds that may be sold at private sale in any fiscal year may not exceed $1 million. However, where a town officer is also an officer of the purchaser, it must be shown that there are at least two other banks unwilling or unable to purchase the bonds at an interest rate equal to or less than that at which the purchaser proposes to buy (see Local Finance Law § 60.10).

§ 4-51. Statutory Installment Bonds. Statutory installment bonds function as a simplified type of serial bond. The same basic laws and limitations that apply to serial bonds apply generally to statutory installment bonds. Statutory installment bonds, however, are limited to $1 million in any fiscal year, subject to the foregoing special requirement where a town officer is also an officer of the purchaser. They are issued in a single-bond form with provision for principal and interest payments both to be noted on the bond form or

a sheet attached thereto. Such bonds must provide for the payment of both the principal and interest upon presentation of the bond for notations of such payments (except when issued to the U.S. government). The form of statutory installment bond is set forth in full in Local Finance Law § 62.10.

§ 4-52. Bond Anticipation Notes and Bond Anticipation Renewal Notes.

A. **Purpose; maturity; renewal.** Bond anticipation notes (BANs) and bond anticipation renewal notes (BARNs) usually mature within a year and are a single, fixed-rate debt obligation. However, BANs and BARNs can be issued for more than one year, up to a period of five years, so long as there is an annual principal payment. BANs and BARNs are renewable annually at maturity at then-current interest rates. A BAN is a new debt obligation, while a BARN is its renewal. BANs and BARNs have principally been used in the past as a means of financing, on a temporary basis during the period of construction or acquisition, a project undertaken by the town. They are also often used for large equipment purchases. Upon the completion of the project, the bonds for the permanent financing are issued, and the bond anticipation notes are paid off. BANs have allowed towns to delay the issuance and sale of bonds until it knew exactly how much money the town was going to need to accomplish the project, and also, to avoid the necessity of paying interest on the full amount of the ultimate obligation until all the money was needed.

B. **Issuance; proceeds.** BANs may be issued by towns in anticipation of the sale of bonds. The proceeds of such notes can be expended only for the same object or purpose for which the proceeds of the bonds may be expended.

C. **Bond resolution.** Bond anticipation notes cannot be

issued until a proper bond resolution has been adopted. Such bond resolution may include the authorization for the notes, or a separate bond anticipation note resolution may be adopted at the same time. When a separate bond anticipation note resolution is adopted, a majority vote of the members of the town board is sufficient for its approval.

D. **Sale.** BANs may be sold at a public, competitive sale or privately, regardless of the amount of the bond. If the town sells the BAN publicly, notice of the sale must follow both Local Finance Law § 60.00 and the state comptroller's rules.

§ 4-53. Registered Obligations. The Federal Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) requires that after July 1, 1983, tax-exempt municipal obligations that mature more than one year after issue be issued in registered form. Failure to comply with TEFRA registration requirements carries penalties against both the issuer and the holder of unregistered securities. Essentially, they lose their tax-exempt and capital gains status. The town board has two options in handling the registration requirement; it can act as its own agent, or it may contract with a bank to perform this function. The process of registration and re-registration is complex and requires expeditious return of the reregistered obligation (i.e., 72 hours). The state comptroller has strongly advised against a municipality acting as its own registration agent. The town should consult with bond counsel should it decide to act as its own agent.

ARTICLE XIV. Noncapital Financing.

§ 4-54. Types of Noncapital Financing; Sale; Deposit of Proceeds. Noncapital financing by towns can be divided into three types: budget notes; tax anticipation notes; and revenue anticipation notes. Generally speaking, all budget notes, tax anticipation notes and revenue anticipation notes may be sold at public competitive sale or by private sale

without limitation as to interest. Any town that issues bonds or notes should be aware that the Local Finance Law also contains various statutory provisions with respect to the deposit of the proceeds from bond or note offerings.

§ 4-55. Budget Notes.

A. **Purpose**. A town is permitted to issue budget notes during a fiscal year to cover expenditures when there is an unanticipated emergency, when funds are insufficient or when no provision has been made in the budget for such expenditure(s). However, there is no authority to issue a budget note for any revenue shortfalls. Budget notes typically indicate some sort of fiscal stress within a local government.

B. **Types.** There are two types of budget notes: emergency budget notes and deficiency budget notes.

1. Emergency budget notes may be issued in any fiscal year to finance any unforeseeable public emergency in such year, such as an epidemic, conflagration, riot, storm, flood, earthquake or other unusual peril to the lives and property of the citizens of the town. Emergency budget notes, however, may not be issued by a town on behalf of a town improvement district. The emergency budget notes may be issued in any amount determined necessary by the town board to deal with the particular emergency.

2. Deficiency budget notes. Deficiency budget notes may be issued for an expenditure for which an insufficient or no provision was made in the annual town budget. Local Finance Law § 29.00 limits the amount of such notes that may be issued to an amount not to exceed 5 percent of the town's annual budget, excluding amounts levied for improvement district purposes. In addition, towns may issue

deficiency budget notes to finance the local share of supplemental appropriations for one or more purposes authorized by or under the Social Services Law, or the local share of financing a Town Highway Improvement Project (Highway Law Article VIII-A). A town may also issue deficiency budget notes on behalf of a town improvement district for expenditures for which no appropriation or an insufficient appropriation was contained in the improvement district's budget. The amount of such notes which may be issued on behalf of an improvement district is subject to a limit of 5 percent of the district budget.

C. **Adoption.** A budget note resolution requires the affirmative vote of at least a majority of the town board. There are no referendum or publication requirements when the town board adopts a budget note resolution.

D. **Payment.** Budget notes must be paid by the close of the fiscal year next succeeding the year in which they were issued, except where authorized and issued in a fiscal year subsequent to adoption of the annual budget for the next year, in which case, they must be paid no later than the second fiscal year next succeeding the year of issue. Thus, in either the next year succeeding the year of issue or the following year (depending upon the exact time of issuance of the budget note), the town is going to be faced with a town budget that provides not only for its normal operations for that year, but also for paying off the budget note. Obviously, the budget for that year will be rather burdensome. Budget note financing is deficit financing – a type of financing that should be avoided except under the most dire circumstances, as its use signals a red flag to rating agencies.

E. **Redemption.** The redemption of budget notes can come from revenues of that fiscal year legally available for such purpose (sales tax revenues, for example), as

well as out of taxes and assessments levied or to be levied for the fiscal year in which the notes mature. Further information on budget notes can be found in Local Finance Law § 51.00.

§ 4-56. Tax Anticipation Notes.

A. **Purpose.** Tax anticipation notes (TANs) are debt instruments that are typically utilized because a town's receipt of property taxes does not line up with its cash flow expenditure requirements within the fiscal year cycle.

B. **When authorized; amount.** A town may borrow against uncollected taxes (1) within 10 days prior to the beginning of a fiscal year or, if the fiscal year is a calendar year, within 30 days of the commencement of the fiscal year, in anticipation of the taxes levied in such fiscal year (2) at any time in a fiscal year against taxes levied for such fiscal year or (3) during any fiscal year in anticipation of the collection of taxes and assessments levied in the four prior fiscal years. When borrowing in the pre-fiscal-year 10-day period, the limit of the amount that may be borrowed is the total of the taxes and assessments as fixed in the adopted budget. Where the borrowing is made in the fiscal year against taxes levied for such fiscal year, the limit for towns is the total amount of taxes and assessments levied and remaining uncollected, less any other outstanding tax notes issued against such levy.

C. **Adoption.** A majority vote of the town board is sufficient to issue a TAN. There are no referendum or publication requirements.

D. **Maturity; renewal.** TANs may be issued with a maximum maturity not to exceed one year, and then may be renewed yearly from time to time for like periods. The last renewal of TANs issued in the 10-day period in

advance of a fiscal year must be paid by the end of the fourth fiscal year succeeding the year in which the original note was issued. In the case of TANs issued in a fiscal year against taxes levied for such fiscal year, the TANs or the renewals thereof must be retired within five years after their date of original issue, and in any event, not later than five years after the close of the year for which taxes or assessments were levied and against which such TANs were issued.

E. Proceeds. The proceeds of TANs may only be utilized for the purposes for which the taxes and assessments were levied.

§ 4-57. Revenue Anticipation Notes.

A. **Purpose**; **issuance.** Revenue anticipation notes (RANs) are another type of debt instrument utilized for cash flow purposes. RANs may be issued by a town in anticipation of taxes (other than real estate taxes), sewer or water rents, or monies to be received from the state or the United States government, from county sales taxes or from any type of income-producing facility or operation owned by the town.

B. Adoption. A majority vote of the town board is sufficient to issue a RAN. There are no referendum or publication requirements. The RAN resolution must specify the specific type of revenue for which the RAN is being issued (i.e. sales tax, sewer rents).

C. **Maturity; renewal.** RANs must mature within one year and may be renewed for a period not exceeding one year. The RAN and the renewal thereof cannot extend beyond the close of the second fiscal year following the fiscal year in which the RAN was issued.

D. Proceeds. The proceeds of revenue anticipation notes may be used only for expenditures payable from the type

of revenue for which the RANs were issued. For additional information on RANs, please see Local Finance Law § 25.00

ARTICLE XV. Installment Purchase Contracts.

§ 4-58. Purpose; Advantages; Limits. General Municipal Law § 109-b authorizes a town to utilize an installment purchase contract to finance equipment, machinery or other apparatus. An installment purchase contract can function as a lease-purchase agreement, an installment sales agreement or any other agreement that allows the town to make periodic payments. Installment purchase contracts provide an alternative means of financing a town's capital equipment needs. Installment purchase financing may or may not be accomplished at rates of interest which are better than or competitive with the methods of debt financing discussed previously. Installment purchase contracts cannot be used to avoid referenda or competitive bidding requirements, nor the prevailing wage rule of the Labor Law. Installment purchase contracts may not exceed the period of probable usefulness of the machine, apparatus or equipment acquired as set forth in Local Finance Law § 11.00.

Installment purchase contracts are subject to competitive bidding requirements, and if the bidding thresholds are triggered, the town must engage in competitive bidding. Note that it is the cost of the commodity being purchased, not the financing, that is subject to the bidding thresholds. To enter into an installment purchase contract, the town must adopt a resolution, and if the financing mechanism utilized to enter into the installment purchase contract requires an approval of a supermajority of the board, the resolution authorizing the installment purchase contract must also be by supermajority.

Towns are authorized to execute “certificates of participation” (COPs) in conjunction with an installment purchase contract. COPs function as a security that

represents a proportionate interest or the right to receive a proportionate share in lease, rental, installment or other periodic payments made by the town pursuant to an installment purchase contract.

There are financial limitations on the amount a town can finance through installment purchase contracts. That is, the amount of the periodic payments on the installment purchase contract, plus the town's outstanding indebtedness and any additional unpaid periodic payments on outstanding installment purchase contracts may not exceed 115 percent of the limit set forth in Local Finance Law § 104. Moreover, unpaid periodic payments on installment purchase contracts may not exceed 40 percent of the amount put forth in Local Finance Law§ 104.

ARTICLE XVI. Reserve Funds.

§ 4-59. Purpose. Reserve funds are a mechanism that allows towns to accumulate cash to finance future capital outlays, infrastructure projects, equipment and other allowable expenditures. Generally speaking, reserve funds are a planning tool that allows towns to make future purchases without having to rely on debt issuances.

§ 4-60. Types and General Requirements. There are various types of reserve funds authorized by statute. Each has its own legal requirements for the establishment of the fund and for the expenditure of monies from it. Generally, all monies in such funds must be deposited and secured in the manner required by General Municipal Law § 10. The town should develop a written policy regarding reserve funds that addresses why monies are being set aside, the town's goals in establishing the reserves, the optimal funding level and the conditions upon which the funds will be utilized. Reserve funds must be invested in accordance with General Municipal Law § 11. The following sections contain a brief description of a few of the more common reserve funds.

§ 4-61. Capital Reserve Funds. A capital reserve fund may be established for accumulating funds over a number of years to finance, in whole or in part, the acquisition or construction of a "specific" or "type" capital improvement or item of equipment. A "capital improvement" includes any physical improvement and any related preliminary studies and surveys; lands or rights in land; any furnishings, equipment, machinery or apparatus for any physical improvement acquired at the time when the improvement is constructed, reconstructed or acquired. "Equipment" includes any machinery, equipment or apparatus not encompassed within a capital improvement that has a period of probable usefulness as established by Local Finance Law § 11.

Capital reserve funds are established by resolution of the town board. There are referenda requirements when utilizing a capital reserve fund, the timing of which depends upon whether it is a "specific" or "type" reserve fund. A "specific" reserve fund is one established for acquiring a particular piece of equipment or for a particular capital improvement (such as the highway garage or a snowplow), whereas a "type" reserve fund is one established for a general category of capital improvements or equipment (such as buildings or snow removal equipment). If the town establishes a "specific" reserve fund, it is subject to permissive referendum upon the establishment of the fund. After the establishment of the "specific" reserve fund, any expenditures therefrom are not subject to permissive referendum. In contrast, the establishment of a "type" reserve fund is not subject to permissive referendum, while any expenditure therefrom is subject to permissive referendum, unless the period of probable usefulness is less than five years – at which point there would be no permissive referendum requirement (see General Municipal Law § 6-c). Note that there are special requirements for towns located wholly or partly in the Adirondack Park that may require the consent of the state comptroller prior to the establishment of, and expenditures or transfers from, a capital reserve fund in the town.

§ 4-62. Insurance Reserve Funds. An insurance reserve fund may be established for the payment of all or part of the cost of any loss, action, judgment or compromised or settled claim, as well as for expert services and the deductible portion of insurance. An insurance reserve fund may not be used to pay for uninsured losses, claims, actions or judgments for which certain insurance is authorized including, among others, accident and health insurance, fidelity and surety insurance, workers' compensation and employers' liability insurance and title insurance (see General Municipal Law § 6-n).

§ 4-63. Reserve Funds for Payment of Unemployment Insurance. Towns also have the ability to establish reserve funds for payment of unemployment insurance (see General Municipal Law § 6-m), workers' compensation claims (see General Municipal Law § 6-j) and for nonrecurring repairs of capital improvements or equipment (see General Municipal Law § 6-d).

§ 4-64. Tax Stabilization and Contingency Reserve Funds. Towns are authorized to establish tax stabilization and contingency reserve funds, by resolution subject to permissive referendum. Expenditures from such a reserve need a two-thirds vote of the town board after a recommendation by the town supervisor. Monies can be expended only for unanticipated revenue losses or expenditures, with certain limitations. They may also be used to lessen a property tax levy increase of greater than 2.5 percent. The balance in a contingency and tax stabilization reserve cannot exceed 10 percent of the town's annual budget. If the balance of a contingency and tax stabilization reserve fund exceeds 10 percent of the budget, the excess must be used to reduce the amount of real property taxes needed to finance the budget for the next fiscal year.

ARTICLE XVII. Depositories and Investments.

§ 4-65. Statutory Requirement; Designation. General Municipal Law § 10 requires local governments to designate one or more banks or trust companies for the deposit of public funds. This designation often occurs at the town's organizational meeting, by a resolution adopted by a majority of the town board. All public deposits in excess of the FDIC-insured amounts must be secured by a pledge of eligible securities by the bank or trust company. Note that there is no authority to designate a credit union as the town's official depository.

The supervisor, town comptroller and their deputies are generally prohibited from having any interest in a bank or trust company designated as a depository. However, if such officials have an interest in a bank that is the only bank in town, it may be designated as a depository, provided that written disclosure of any such interest is made to the town board. In other words, a conflict of interest will not force the designation of a bank outside of the town limits, so long as full and complete disclosure of such interest is made known to the town board and incorporated in the town board minutes. If the bank where an interest is held is located outside the jurisdictional limits of the town, even though closer than the next nearest bank, it may not be designated as a depository for town funds. (For additional information, see Chapter 2, Town Officers and Employees, Article VI, Ethics and Conflicts of Interest.)

§ 4-66. Investment of General Fund Monies; Purpose; Considerations. Many towns are able to realize substantial revenue from the temporary investment of general fund monies as authorized by General Municipal Law § 11. Revenue received from temporary investments may be applied in town budgets as anticipated revenue, and as such, used to reduce the amount to be raised by tax. Care must be taken, however, to ensure that only the specific obligations prescribed below are bought, and also, that their redemption periods are such that the invested monies will be available when needed for necessary application to appropriate budget item expenses. Careful thought and planning is imperative; if the town board finds that it must sell these obligations prior to their maturity date, penalties may be imposed or interest forfeited. If this occurs, the budget item of anticipated revenue in this regard would not be available, and the town budget could be thrown substantially out of balance.

§ 4-67. Authorized Investments.

A. **Types.**

1. General Municipal Law § 11 provides for the temporary investment of general fund monies not required for immediate expenditure. These investments may be:

a) Special time deposit accounts or certificates of deposit issued by a bank or trust company located in and authorized to do business in this state; or

b) In accordance with the following conditions:

i. The moneys are invested through a bank or trust company located and authorized to do business in New York;
ii. The bank or trust company arranges for the deposit of the moneys in certificates of deposit in or more banking institutions (as set forth by Banking Law § 9-r) for the account of local government;
iii. The full amount of principal and accrued interest of each such certificate of deposit must be insured by the federal deposit insurance corporation;
iv. The bank or trust company acts as custodian for the local government with respect to such certificates of deposit issued for the town's account; and
v. At the same time the town's moneys are deposited and the certificates of deposit are issued for the account of the town, the bank or trust company receives an amount of deposits from customers of other financial institutions equal to or

greater than the amount of the moneys invested by the local government through the bank or trust company.

2. Investments may also be made in the following:

a) Obligations of the United States of America or in obligations guaranteed by agencies of the United States where the payment of principal and interest is guaranteed;

b) Obligations of the State of New York;

c) Obligations guaranteed by agencies of the United States where the principal and interest are guaranteed by the United States of America; and

d) Tax anticipation notes (TANS) or revenue anticipation notes (RANS) issued by another municipality, school district or district corporation, provided approval is obtained from the state comptroller.

3. In addition, monies in any reserve fund may be invested in obligations of the town that established the reserve.

B. **Time deposits and certificates of deposit.** Time deposits and certificates of deposit must be payable within such time as the proceeds shall be needed to meet expenditures for which such monies were obtained, and the deposit must be secured by a pledge of eligible securities in the same manner as required by General Municipal Law § 10 (3) for all public funds.

C. **State, local or federal government obligations.** Investments in United States Treasury obligations, obligations of the State of New York, TANS or RANS of other municipalities or in one's own reserve funds must

be payable or redeemable at the option of the owner within such time as the proceeds will be needed to meet authorized expenditures, and in the case of obligations purchased with bond or note proceeds, shall be payable or redeemable in any event, at the option of the owner, within two years of the date of purchase.

D. **Custody.** In addition, unless these obligations are registered or inscribed in the name of the town, they must be purchased through, delivered to and held in custody of a bank or trust company in New York State, and are to be sold or presented for payment only by the bank or trust company upon receipt of written instructions from the officer of the town authorized to make the investment.

The physical custody and safekeeping of the evidence of investments authorized under General Municipal Law § 11 can be held, per authorization of the town board, in the custody of:

a. Any bank or trust company incorporated in New York, or
b. Any national bank located in New York, or
c. Any private banker duly authorized by the superintendent of financial services of New York to engage in business in New York (see General Municipal Law § 11 [4]).

Chapter 5
STATE ENVIRONMENTAL QUALITY REVIEW (SEQR) ACT

No manual for town supervisors and town boards could be complete without some mention of the State Environmental Quality Review Act (SEQR) (Environmental Conservation Law Article 8; 6 NYCRR Part 617). However, SEQR can be an extensive process warranting an entirely separate manual, and this manual provides only very general information. More information on SEQR can be obtained from the Association of Towns or from New York State's Department of Environmental Conservation website.

§ 5-1. Purpose; Scope.

A. SEQR establishes a process that requires the consideration of environmental factors early in the planning stages of any action directly undertaken, funded or approved by a local, regional or state agency. By incorporating a systematic approach to environmental review in the early planning stages, projects can be modified as needed to avoid adverse impacts on the environment.

B. The basic purpose of SEQR, as expressed by the Legislature, is: " … to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state."

C. All agencies of government at the state, county and local levels in New York, except the state Legislature and the courts, must comply with SEQR.

§ 5-2. Decisions Subject to SEQR. All discretionary decisions of town boards and decision-making bodies – such as a planning board or zoning board of appeals – to approve, fund or directly undertake an action that may affect the environment are subject to review under SEQR.

A. **Action:** What's considered an "action" is extremely broad. Actions may include:

1. Physical actions that may affect the environment by changing the use, appearance or condition of natural resources or structures, whether those actions are directly undertaken by an agency, involve funding or require approvals.

2. Planning or policy-making activities that may affect the environment and create a course for future decisions; for example, significant amendments to a town's comprehensive plan.

3. Adopting rules, regulations and procedures – that is local laws, codes, ordinances, executive orders and resolutions – that may affect the environment.

4. Any combination of the above; for example, site plan review where a zoning variance or change is also required.

§ 5-3. Classification: Once it is determined that an action is subject to SEQR review, the action must be classified as either a "Type I," "Type II" or "Unlisted" action. How an action is classified is important because it directs which forms to use, and what level of environmental review is appropriate. The list of Type I actions may be found in 6 NYCRR 617.4. Type I actions require further environmental review because these types of actions are most likely to have a negative environmental effect. The list of Type II actions may be found in 6 NYCRR 617.5. Additionally, a town may adopt its own list of Type II actions to supplement what's found in the state regulations. If an action is classified as Type II no further review is necessary. If an action is not

listed as Type I or Type II, it is an Unclassified Action, which is the largest category of actions, and is subject to review by the lead agency to determine whether it may cause significant environmental impacts.

§ 5-4. Lead Agencies and Involved Agencies. The lead agency is "principally responsible for undertaking, funding or approving an action." Thus, the lead agency is responsible for determining whether an environmental impact statement ("EIS") is required in connection with the action and for preparing and filing the EIS if one is required. An "involved agency" is an agency that has jurisdiction by law to fund, approve or directly undertake an action. For example, a town board may designate itself as the lead agency for a variance; however, the zoning board of appeals, as the board that has the authority to grant or deny a variance, would be an involved agency.

§ 5-5. Environmental Assessment Form (EAF). Environmental review starts with an EAF, which is a checklist of potential areas where environmental impacts could be significant. There are two different versions: (1) the long-form EAF, which must be used for Type I actions, and at the discretion of the lead agency, may also be used for unlisted actions or for projects where the short-form EAF will not provide sufficient information and (2) the short-form EAF, a much smaller form designed for use with small, unlisted actions. EAFs are filled out by the project sponsor.

§ 5-6. Declarations. Once the lead agency reviews the completed EAF, it must make a positive or negative declaration. A positive declaration means that adverse impacts will be "significant," while a "negative declaration" means that they will not. A positive declaration means that SEQR review must continue and an Environmental Impact Statement ("EIS") must be prepared. A negative declaration ends SEQR review. Alternatively, the lead agency may issue a "conditioned negative declaration." A conditioned negative declaration may be used only for unlisted actions, and only in limited circumstances when a lead agency concludes that a

proposed action may have a potentially significant adverse impact on the environment that can be eliminated or mitigated by conditions imposed by the lead agency. If the lead agency issues a conditioned negative declaration, there are further procedural requirements that must be followed. Declarations must be in writing, contain "a reasoned elaboration" of the basis for the declaration and demonstrate that the decision-making body "thoroughly analyze[d] the identified relevant areas of environmental concern."

§ 5-7. Environmental Impact Statement and Public Comment. An "EIS" identifies and analyzes all potential significant adverse environmental impacts, alternatives to the project as proposed and actions that could mitigate environmental impacts, among other things. An EIS may go through several drafts before the lead agency accepts it. For example, the lead agency may ask the project sponsor to take a look at potential impacts in greater depth, and the sponsor would need to submit another draft EIS. Once the lead agency accepts the draft EIS, it must be made available to the public, and comments must be accepted for at least 30 days. A public hearing may also be held on the draft EIS. After the comment period and public hearing (if any), the project sponsor must submit a final EIS.

§ 5-8. Findings. Once the final EIS is filed with the lead agency, each involved agency must submit a SEQR findings statement before a final decision is rendered. A positive finding means the project or action is approvable, and the project avoids or minimizes adverse environmental impacts to the maximum extent practicable. If the action is not approvable, the lead agency must prepare a negative findings statement listing the reasons for the denial. The findings can be finalized no sooner than 10 days following the filing of the Notice of Completion of the Final EIS, and if the action involves an applicant, the lead agency's findings must be made within 30 days from the filing date. Findings of each agency must be filed with all other involved agencies and the applicant.

Chapter 6
TOWN LEGISLATION

Town boards serve as the legislative branch of town government and in this capacity, one of the main functions and duties of a town board member is to enact local legislation. Generally speaking, the town board will encounter three types of local legislation: resolutions, ordinances and local laws.

When enacting local legislation, it takes the votes of a majority of any fully constituted board (that is, not just a majority of those present) in order for a town board or body to take any action (General Construction Law § 41). This means that three "aye" votes are necessary for five-member boards to take even the most basic action, such as the payment of bills. In certain circumstances, a two-thirds or other supermajority vote may be required. Note that failure to muster three affirmative votes – such as with a 2-2 tie – is effectively a denial.

ARTICLE I. Resolutions.

§ 6-1. Overview. Of the three types of action taken by a town board in its legislative and administrative capacities, resolutions involve the least amount of formality and routine. Resolutions can be introduced and passed at the same meeting, and typically cover the day-to-day business of town, including transferring money from one budget account to another, establishing salaries, designating a depository and approving employee bonds, among other things.

§ 6-2. Form and Procedure of Resolutions. In addition to being used for the day-to-day workings of a town, resolutions are also utilized to introduce ordinances and local laws into the town board proceedings and to formalize its ultimate

adoption or rejection of ordinances and local laws after other formalities, such as conducting a public hearing, are handled.

Preamble. It is a best practice to state the reasons for the proposed action, which would be done as a preamble to the resolution in an opening paragraph beginning with the word "WHEREAS." However, the reasons for the resolution are often obvious, and the subject matter is rarely controversial, removing the need for a preamble.

Body. The body of the resolution should be clear and concise and contain all of the details of the issue.

Bond resolutions. Resolutions authorizing a borrowing must comply with strict legal requirements. The Local Finance Law sets forth the required form and contents of a borrowing resolution, and this formal resolution should be recorded in the minutes. Generally, a bond resolution is drafted by a bond attorney, and since its provisions cover specific statutory requirements, it should be entered in the minutes without alteration. A bond resolution usually begins by enumerating the date, amount and purpose, followed by the specifics required for the particular purpose.

§ 6-3. Motions. Resolutions are often confused with motions. Motions are the vehicle by which laws, ordinances and resolutions are brought before a town board for action. Resolutions and motions are often used interchangeably in fulfilling the administrative functions of the board, such as approving claims for payment. For instance, a town board may "adopt a resolution" calling for payment of all claims presented, or a board member may simply "move" their approval for payment. Resolutions may be and frequently are prepared in advance.

ARTICLE II. Ordinances.

§ 6-4. Overview and Authority. An ordinance is a legislative act of the town board that is applicable within the jurisdictional limits of the town. Town Law § 131 sets forth that "a town ordinance also includes a rule or regulation of the town board, for the violation of which a penalty is imposed." Ordinances are more formal than a resolution but carry less weight and authority than a local law.

Ordinances are typically used for actions of a more permanent nature. The authority to enact and enforce ordinances is set forth in Town Law §§ 130-134, as well as Town Law §§ 264-265 as the ordinances relate to zoning.

§ 6-5. Subject Matter of Ordinances; Licenses. Town Law § 130 contains specific subject areas in which a town board is specifically authorized to enact ordinances. Those subject areas include:

- Building Code
- Plumbing Code
- Electrical Code
- Housing Code
- Sidewalks
- Fire prevention

- Public dumps and dumping grounds
- Use of streets, highways, sidewalks and public places
- Driveways
- Smoke, gases and wastes
- Animals
- Malicious mischief
- Peace, good order and safety
- Amusements
- Beverages and eating places
- Slaughtering and rendering works
- Promotion of public welfare
- Excavated lands
- Unsafe buildings and collapsed structures
- Vessels, personal watercraft and specialty propcraft
- Shellfish
- Trespass
- Hotels, inns and boarding houses
- House trailer camps, tourist camps and house trailers
- Airports and flying fields
- Sand pits, quarries, topsoil and other excavations
- Riding stables and riding academies
- Building lines
- Air guns
- Billiard rooms (subject to permissive referendum)
- Loitering

Town Law §§ 264-265 grants towns specific authority to enact zoning ordinances. Towns also possess the authority to enact ordinances regulating specific topics whenever indicated in state law. These areas include (but are not limited to):

- Games of chance and bingo (General Municipal Law Articles 9-a & 14-H)
- Dogs (Agriculture and Markets Law Article 7)
- Traffic regulations (Vehicle and Traffic Law §§ 1622, 1660, 1660-a and 1662-a)
- Environmental quality review (Environmental Conservation Law Article 8)
- Wetlands (Environmental Conservation Law Article 24)

Towns may also enact ordinances regulating occupations and businesses through licensing. Town Law § 136 grants towns the explicit authority to regulate:

- Auctioneers, employment agencies, collateral loan brokers, junk dealers, taxicabs and soliciting
- Retail sales from canal boats or on banks of canals
- Circuses, theaters, motion picture houses, shows or other exhibitions, billiard and pool rooms, bowling alleys, shooting galleries, skating rinks and amusement parks
- Public halls and opera houses
- Plumbing, heating, ventilating and electrical work
- Operation of restaurants
- Dance halls
- Hotels
- Tourist camps
- Trailer camps

- Riding academies
- Garbage collection
- Mink raising
- Excavations and stripping of topsoil in certain towns; and
- Laundromats in certain towns

The town may charge a fee when issuing licenses related to the aforementioned occupations. The fee must be reasonable and should function to cover only the costs associated with issuing the license; such fees cannot be set at an amount that would discourage anyone from entering into the activity, nor may the fees be used as a source of revenue covering the general cost of government of the town.

§ 6-6. Procedure for Adopting an Ordinance. Town Law Article 9 governs the method and procedure to follow when enacting ordinances. The town must adhere meticulously to the procedure outlined; otherwise, it could be invalidated by the courts.

> **Introduction:** After a town board has agreed to the general purpose and intent of a proposed ordinance, the ordinance should be drafted and introduced at a regular or special meeting of the town board in accordance with the town's rules of procedure. A town board member initiates the ordinance by moving the adoption of a resolution introducing it. The resolution should include the proposed ordinance in full. This resolution should be adopted by the affirmative vote of a majority of the town board and entered in the minutes of the town board proceedings.
>
> **Public Hearing:** After the ordinance is introduced, a public hearing must be held on the question of the adoption of the ordinance. The town clerk must publish a notice of the time and place the public

hearing will be held. Such notice must describe the ordinance in general terms and be published at least 10 days prior to the date of the hearing in a newspaper of general circulation throughout the town.

The town board must meet at the time and place specified in the notice of the hearing on the ordinance. At this hearing, the town clerk should read the proof of publication of the notice of hearing on the proposed ordinance. If the ordinance is complicated, the supervisor, town attorney or the member of the town board who introduced the ordinance should be ready to discuss the purpose and intent of the ordinance, as well as its numerous provisions.

Anyone attending must be allowed to comment on the proposed ordinance. The ordinance does not need to be voted on at the close of the public hearing. In fact, it might be necessary for the town board to defer its decision to be able to give careful thought to any suggestions made by all who appeared and spoke at the hearing.

Voting/Adoption: The vote on the question of the adoption of an ordinance is a vote by the town board members alone. Whether the ordinance is adopted when the hearing is held or at a subsequent meeting of the town board, the ordinance must be adopted in the form in which it was presented at the hearing. Any substantive changes may not be adopted without the reintroduction of a proposed new or amended ordinance, followed by another public hearing.

When the town board has determined to adopt an ordinance, the adoption of the ordinance is accomplished by the introduction of an additional resolution and its subsequent adoption by a majority

vote of town board members.

After adoption, the ordinance must be entered in full in the town board minutes. In addition, the town clerk must enter a copy into a book known as the "ordinance book." It is permissible to have the newspaper run an extra copy of the print of the ordinance, or the town clerk may cut a copy of the ordinance from the newspaper for insertion in the ordinance book. It must be an exact copy of the ordinance and must be entered immediately after adoption by the town board.

Publication: To become effective, the text of the ordinance or amendment, or a summary or abstract thereof, must be published in the official newspaper, or if there is none, in a newspaper designated by the town board having general circulation in the town. Affidavits of publication of ordinances are still required to be filed with the town clerk (Town Law §§ 133, 134, 264, 265). The ordinance becomes effective 10 days after such publication, but it shall take effect from the date of its service as against any person served personally with a copy thereof, certified by the town clerk under the corporate seal of the town and showing the date of its passage and entry in the minutes.

An ordinance, once adopted, is amended or repealed by the adoption of another ordinance or local law amending it or repealing it, following the same procedural steps required on the adoption of any other ordinance.

§ 6-7. Additional Requirements for Zoning Ordinances. There are a few additional procedural steps with which to comply when adopting a zoning ordinance. Specifically, written notice of any proposed change affecting property within 500 feet of the boundaries of any other municipality,

county or state park or public housing project must be given to the clerk or other person performing similar duties of such municipality or government unit at least 10 days prior to the date of the public hearing. All parties in interest, citizens and any municipality or unit served as noted above shall have the right to appear and be heard at the public hearing.

Additionally, the town clerk is required to maintain a separate file or filing cabinet for each zoning map adopted in connection with a zoning ordinance, which must be available for public inspection.

General Municipal Law grants county planning boards the authority to review zoning ordinances if they affect property within 500 feet of municipal boundaries or county- or state-owned land, parks or rights-of-way. If there is no county planning board, then such review is made by the metropolitan or regional planning board having jurisdiction of the territory of the town, if any (see General Municipal Law § 239-l). Notice of the proposed zoning ordinance or of the proposed issuance of any permits or variances pursuant to a town's zoning regulations must be given to a county planning board or metropolitan or regional planning board. The board will have 30 days to review and make a recommendation. If no recommendation is made in such period, the town may proceed without such report. If the county, metropolitan or regional board to which the matter has been referred disapproves of the proposal, the local board of the town contemplating action may not proceed except by a majority plus one vote. A resolution setting forth the reasons for such contrary action must be approved and sent on to the county or regional planning agency within seven days (see General Municipal Law § 239-m).

§ 6-8. Preemption of Ordinances by State Law. It is important to note that while towns possess the authority to enact ordinances, they may not enact ordinances that directly conflict with a state statute or relating to a field where the state has assumed full regulatory responsibility

(such as the sale of alcoholic beverages). A town may not legislate on any subject matter where the state has preempted the field, either expressly or impliedly.

§ 6-9. Enforcement. An ordinance is only as good as its enforcement. Accordingly, it is important to ensure that all ordinances adopted are enforced. There are several methods of enforcement of a town ordinance, including:

1. Fines and/or imprisonment. When a violation is declared by the ordinance to be a "misdemeanor" or an "offense" against the ordinance, the most common method of enforcement is for the ordinance to provide for the imposition of a fine or for imprisonment or for both, as a criminal penalty in the case of a proved violation.
2. Civil penalties. The ordinance may provide for a civil penalty instead of a criminal penalty.
3. Injunctions. A town may maintain an action in court to compel compliance or to restrain further violations.

A fairly unique enforcement authority exists in the case of a violation of a town zoning ordinance. Three taxpayers of a district may institute an appropriate action or proceeding against a violator if, after 10 days, written request to the proper local enforcement officer or board to so proceed, no such action or proceeding has been started (see Town Law § 268).

ARTICLE III. Local Laws.

§ 6-10. Overview and Authority. A local law is the highest form of legislation a local government can enact, and it carries the same weight and authority as a state statute enacted by the state Legislature. The enactment of the Municipal Home Rule Law granted towns the ability to legislate in a vastly broader field of subject matters than by ordinance. Local laws are subject to judicial notice without

request, meaning that during a trial, a town does not have to demonstrate formal proof of legal adoption. Additionally, local laws can be enacted more quickly than ordinances and can go into effect at any point. Once a local law is enacted, it is filed with the New York State Secretary of State; there is no requirement to publish it in the town's official newspaper.

§ 6-11. Protection of Town Home Rule Authority.
Restriction on state's ability to pass special laws regarding towns: The enactment of a home rule article in the state Constitution granted towns immunity from state legislative action. This immunity means that the state Legislature is prohibited – except on a certificate of necessity from the governor – from adopting any law that relates to the "property, affairs or government" of a town, whenever that state law did not apply to every town of the state, unless the law is requested by the town or towns concerned.

A special law that relates to the "property, affairs or government" of a particular town may be enacted by the State Legislature only in the following instances:

1. By a home rule request initiated and approved by a two-thirds vote of a town board;

2. By a home rule request by the town supervisor of the town concurred in by a majority vote of the town board; or

3. On a certificate of necessity from the governor of the state.

Protection of Statute of Local Governments: The Statute of Local Governments, which became effective July 1, 1965, provides another important safeguard to local governments from state legislation. The statute is a repository of the basic powers of local governments. A power, once granted in the Statute of Local Governments, may not be diminished or impaired by a single act of the Legislature. Similar to

constitutional amendments, action by the Legislature is required in two calendar years in order to repeal, diminish, impair or suspend a power granted in the statute. It also requires two approvals by the governor.

Courts and Municipal Home Rule Law: The courts of New York State have treated the home rule enactments with a degree of skepticism and restraint. They have tended to find that certain subject matters – such as salaries of district attorneys and land use matters in the Adirondack Park – do not fall within the general ambit of the "property, affairs or government of local government," but rather, are matters of state concern, thus allowing the Legislature to enact laws without regard to the home rule law protections. Similarly, courts have too readily looked to the innumerable state laws in subject areas such as local highway funding to conclude that a subject area has been "preempted" so that local laws on that same subject may not be enacted by local government without specific enabling authority. Despite the lukewarm treatment of the home rule power by the courts, it still holds great promise for imaginative town governments with problems to solve. It is important to recognize that towns have a source of authority beyond the specific provisions of Town Law or other similar enabling statutes such as the General Municipal Law.

§ 6-12. Areas of Town Board Local Law Authority. Town boards may adopt local laws concerning the property, affairs or government of the town, provided such local law is not inconsistent with a general law enacted by the Legislature. "General," in this case, is defined as a law applicable to all towns alike. Under this authority, it is possible for a town board to adopt local laws that may change provisions of state law not generally applicable to all towns in the state, provided the subject matter falls within the ambit of the "property, affairs or government."

In addition, towns may adopt local laws concerning a number of subjects, so long as such local laws are not inconsistent

with general laws applicable to all towns, and additionally, there has been no statutory restriction on such local legislation. Briefly, these include:

1. Powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of town officers and employees;

2. Membership and composition of town boards;

3. Transaction of business;

4. Incurring of town obligations (except in connection with financing by issuance of obligations, which must be consistent with the Local Finance Law);

5. Presentation, ascertainment, disposition and discharge of claims;

6. Acquisition, care, management and use of highways, roads, streets, avenues and property;

7. Acquisition of transit facilities and the ownership and operation thereof;

8. Levy, collection and administration of local taxes and assessments; and assessments for local improvements authorized by the Legislature;

9. Fixing, levy, collection and administration of rentals, charges, rates or fees, penalties and rates of interest thereon, liens on local property in connection therewith and charges thereon;

10. Wages, salaries, hours of work or labor and the protection, welfare and safety of persons employed by any contractor or subcontractor performing

work, labor or services for the town;

11. Protection and enhancement of its physical and visual environment;

12. The government, protection, order, conduct, safety, health and well-being of persons or property, including the power to provide for the regulation or licensing of occupations or businesses:

a) This is limited to the area of the town outside villages.

b) Where any county is specifically authorized to regulate or license an occupation, the exercise of such power shall not relate to a town (outside of any villages therein) during such time as the town is regulating or licensing such business or occupation;

13. Apportionment of its legislative body, composition and membership, terms of office of members thereof, areas from which representatives are to be chosen and voting powers of individual members;

14. Powers granted in the Statute of Local Governments.

§ 6-13. Authority to Supersede Town Law. Perhaps the most useful element of home rule local law power is the Municipal Home Rule Law §10 (1) (ii) (d) (3) grant of authority to towns to supersede or amend any provision of Town Law, with certain exceptions. Those exceptions include the provisions in Town Law relating to: (i) improvement districts; (ii) the creation of areas of taxation; (iii) authorizing or abolishing referendum requirements; or (iv) town finances. Thus, the whole structure of town government, even those defined by Town Law, can be

addressed using a town's home rule authority. Terms of office, the abolition or creation of new positions, and the alteration of various procedural mandates can all now be changed by local law. The only caveat is that the local law specify which section and paragraph of the Town Law is being superseded. Additionally, there may be procedural issues to consider; some local laws may require a mandatory or permissive referendum prior to their enactment. The scope of the supersession authority is limited regarding a town zoning board of appeals granting area or use variances. New York's highest court has ruled that for reasons of standardization, the variance standards in the State Village Law, and by extension the Town Law, cannot be superseded [*Cohen v. Board of Appeals of Village of Saddle Rock*, 100 NY2d 395, 795 N.E.2d 619, 764, NYS2d 64 (2003)].

§ 6-14. Effect of Local Laws on Ordinances. Town boards may still legislate by ordinance. The granting to towns of home rule local law powers in no way affected the town's ability to legislate by ordinance. The Municipal Home Rule Law specifically provides, however, that anything a town board is empowered to accomplish by ordinance may now alternatively be accomplished by the enactment of a local law, including the amendment of ordinances previously enacted.

§ 6-15. Restrictions on Adoption of Local Laws. In addition to the general "preemption" limitation on local law powers mentioned previously, Municipal Home Rule Law § 11 contains specific subject areas wherein a local law cannot supersede a state statute. The town cannot adopt local laws that would:

A. Change debt or tax limits;

B. Remove a restriction regarding the issuance of bonds or other obligations;

C. Affect the education system or teachers' benefits;

D. Change the number or term of members of a county board of supervisors chosen in a town, except in the case of an alternative form of county government;

E. Apply to courts;

F. Apply to or affect the:

1. Election Law § 8-100;

2. Labor Law;

3. Hours and holidays of certain firemen and policemen;

4. Volunteer Firefighters' Benefit Law;

5. Workers' Compensation Law.

G. Change any provision of the Multiple Residence Law;

H. Affects powers of the state comptroller relative to auditing or examination of municipal accounts, or approval of districts;

I. Impact grade crossings or terminal facilities;

J. Relate to judicial review of dismissals from civil service.

§ 6-16. Procedure for Adopting a Local Law. Municipal Home Rule Law Article 3 sets forth the procedure to follow when enacting a local law. This procedure should be meticulously adhered to, as procedural deficiencies could render the local law invalid upon challenge. Below is a synopsis of the steps required to enact a local law; of course, one should carefully review Article 3 and/or consult with the town attorney to ensure all legal requirements are met.

A proposed local law is introduced by a member of the town board at a town board meeting or as otherwise prescribed by the town board's rules of procedure.

A proposed local law must be in final form on the desks or table of town board members for seven calendar days, exclusive of Sundays, or be mailed to each member at least 10 days, exclusive of Sundays, prior to passage, unless the town supervisor certifies as to the necessity for its immediate passage. A local law passed immediately upon certificate of necessity by the supervisor requires a two-thirds approving vote by the town board. In ordinary cases, only a majority vote is necessary.

"On the desks," which prescribes a seven-day aging requirement, means either physically on the desks of the town board members or by delivery via electronic means, such as through a file sharing service **(this does not include delivery via e-mail)**.

Mailing the proposed local law, which prescribes a 10-day aging requirement, means either delivery through the United State Post Office or via e-mail. To introduce a local law through e-mail, the local law must be in Portable Document Format (PDF). Additionally, the town must adopt a unanimous resolution authorizing delivery through e-mail, ensure that each town board member has an e-mail address, and publish such e-mail addresses on the town clerk's bulletin board.

After the local law is introduced, a public hearing must be held before the town board on public notice through publication in the town's official newspaper. Five days must elapse between the date of publication of the notice in the paper and the date of the public hearing, although the town board may, by local law, shorten the notice period to three days.

After the public hearing, the board may vote on the local law.

The vote is by "ayes" and "noes." Names of members present and their votes must be entered in the town board minutes. The local law must be certified by the town clerk after passage. Note that the town attorney no longer needs to certify the local law in order for the law to be valid, although the town may still utilize the attorney to certify the law.

If the local law is subject to mandatory referendum or submitted to election as a result of petition, the proposition on such local law must be submitted as described below and affirmed by a majority of the electors voting thereon.

Within 20 days after a local law has finally been adopted, town clerks must file one certified copy in their office and one certified copy with the Secretary of State. No local law is effective until it is filed with the Secretary of State. Subject to that filing requirement, a local law otherwise takes effect on the 20th day after final adoption, unless a different time is specified within the law.

a) If the local law was subject to mandatory referendum, then such local law must be filed as above described within 20 days after approval of electors.

b) If the local law was subject to permissive referendum and no petition is filed, the filing, as above described, must be accomplished within 20 days after the time for filing a petition has expired.

The certified copies filed as above should contain the text of the local law only (i.e., without brackets or italics that may appear in the original draft). The town clerk must record all local laws filed in his or her office in a separate book or books, which must be indexed.

§ 6-17. Filing of Local Laws. An original, certified copy of each local law must be filed with the Secretary of State within

20 days after its final adoption or approval. A local law is not effective until it is filed with the Secretary of State. Only the number, title and text of the local law should be filed, on a form provided by the Department of State.

For the purpose of filing with the Secretary of State, local laws should be numbered consecutively, beginning with number "1" each calendar year. This numbering is independent of any identifying numbers that may be used while a proposed local law is being considered for adoption. Each copy of a local law filed with the Secretary of State must have affixed to it a certification by the clerk of the board of supervisors or the town clerk or other officer designated by the town. Certification forms can be provided by the Department of State. A copy of each local law may be mailed or delivered to:

NYS Department of State
Division of Corporations, State Records and Uniform Commercial Code
One Commerce Plaza, 99 Washington Avenue
Albany, NY 12231

§ 6-18. Local Laws Subject to Mandatory Referendum. Certain local laws are subject to mandatory referendum, which requires approval at a general or special election by the town's electorate. Local laws that are subject to mandatory referendum must comply with the general enacting procedure set forth above, as well as certain additional requirements.

Specifically, the local law must be submitted at the general election held not less than 60 days thereafter, unless:

1. The local law provides for submission at a special election; or

2. Within 30 days after adoption, a petition is submitted requesting its submission at a special

election. Such petition must be:

a) Signed by electors of the town who were registered to vote in the last general election. The petition must contain the signatures of at least 10 percent of the number of votes cast for governor at the last gubernatorial election;

b) Authenticated;

c) Filed with the town clerk; and

d) Certified by the town clerk to the town board within 30 days after the date of its filing or 45 days before the day of election, whichever is earlier, to the effect that he or she has examined it and found that it complies or does not comply with all the requirements set forth by law.

3. Within five days after the last day, the clerk can file his or her certification; objections to the certification may be taken to the Supreme Court or any justice thereof.

A local law is subject to mandatory referendum if it:

a) Changes membership or composition of the town board or increases or decreases the number of votes any member can cast;

b) Changes the veto power of the chief executive officer. NOTE: Towns do not presently have a chief executive officer as defined in the Municipal Home Rule Law (that is, an officer who has veto power). However, it would appear that a town could enact a local law giving the supervisor veto power

subject to mandatory referendum because such law would, in effect, be changing the veto power;

c) Changes the law of succession to the office of town supervisor;

d) Abolishes an elective office, or changes the method of nominating, electing or removing an elective officer; changes the term of an elective officer, or reduces the salary of an elective officer during his or her term of office;

e) Abolishes, transfers or curtails any power of an elective officer;

f) Creates a new elective office; or

g) Changes a provision of law relating to public utility franchises.

§ 6-19. Local Laws Subject to Permissive Referendum – Municipal Home Rule Law. A permissive referendum on a local law enacted under the town's home rule authority is required when a statute authorizes the voters to submit a petition requesting a vote on a local law prior to its enactment or, in the alternative, when a statute authorizes the town board to, by resolution, put the issue before the voters.

Any petition put forth by the voters must be filed with the town clerk within 45 days of the local law's adoption by the town board. If no petition is filed within this timeframe, the local law becomes effective upon the date set forth within the law. If a petition is filed within 45 days from the date of the adoption, it must be:

a) Signed by electors of the town who were registered to vote in the last general election. The petition must contain the signatures of at least 10 percent of the number of votes cast for governor at the last gubernatorial election;

b) Authenticated;

c) Filed with the town clerk; and

d) Certified by the town clerk to the town board within 30 days after the date of its filing or 45 days before the day of election, whichever is earlier, to the effect that he or she has examined it and found that it complies or does not comply with all the requirements set forth by law.

As is the case with a mandatory referendum, objections to the certification may be taken to the Supreme Court or any justice thereof within five days after the last day the clerk can file his or her certification.

If a petition is properly filed, the proposition on such local law must be submitted at a general election held not less than 60 days thereafter – unless the petition requests and another local law is adopted to submit such proposition at a special election held not less than 60 days after adoption of this latter law.

A local law that does the following is subject to permissive referendum pursuant to Municipal Home Rule Law:

a) Dispenses with a provision of law requiring a public notice of hearing as a condition precedent to official action.

b) Changes a provision of law relating to public

bidding, purchase or contract.

c) Changes a provision of law relating to assessment of real property or benefit assessments for local improvements.

d) Changes a provision of law relating to the exercise of the power of condemnation.

e) Changes a provision of law relating to authorization or issuance of bonds or other obligations.

f) Changes a provision of law relating to the auditing of the accounts of the town.

g) Changes a provision of law relating to the alienation or leasing of real property of the town.

h) Increases the salary of an elective officer during his or her term of office.

i)Concerns reapportionment.

§ 6-20. Reconsideration of a Local Law Subject to Referendum. At any time within 15 days of an election on a proposition on a local law subject to mandatory or permissive referendum, the town board may reconsider its action and repeal such local law, in which case no proposition for approval shall be submitted, or, if submitted, approval by voters shall be ineffective.

§ 6-21. Acts and Resolutions of the Town Board Subject to Permissive Referendum – Town Law Article 7. While some local laws are subject to permissive referendum requirements as set forth by Municipal Home Rule Law, Town Law Article 7 provides that any acts and resolutions of the town board subject to permissive referendum requirements in Town Law must adhere to the procedure

elucidated in Article 7. Specifically, any petition put forth by the voters must be filed with the town clerk within 30 days from the date of the act or resolution. If no petition is filed within this timeframe, the act or resolution becomes effective. If a petition is filed within 30 days from the date of adoption, it must be:

> a) Signed by electors of the town, with the signatures of at least 5 percent of the number of votes cast for governor at the last gubernatorial election, **although not less than 100 in a town of a first class, and not less than 25 in a town of the second class**;
> b) Authenticated; and
> c) Filed with the town clerk.

If a written objection to the petition is filed with the town clerk within five days of its filing, and a verified petition setting forth the objections to the petition is presented to the supreme court or any justice thereof, such court or justice must determine any question or issue brought forth by the objection within 20 days from the date of the verified petition and make any order as required.

If no objection to the petition is filed, a proposition for the approval of such act or resolution must be submitted at a biennial town election that occurs 60 to 75 days from the date of the filing of the petition. If no biennial election is occurring within that timeframe and a petition is filed at any other time, a proposition for the approval of such act or resolution must be submitted at a special town election to be held not less than 60 nor more than 75 days after the petition is filed.

Chapter 7
PLANNING AND ZONING

ARTICLE I. Introduction.

§ 7-1. Overview. Through planning and zoning, towns have the authority to plan for and regulate the development of and use of real property for the community's health, safety and welfare. The basic premise of planning and zoning balances the well being of the community against individual property interests by adopting local laws that are in line with the needs of the area and the town's vision for development, whether it be maintaining open space or fostering industrial development. Article 16 of Town Law is the primary source for planning and zoning authority and allows towns to "regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes," (Town Law § 261).

§ 7-2. Limitation on Zoning Authority. The central tenet of zoning is its concern with land use but not who uses or occupies the land (see *Sunrise Check Cashing v. Town of Hempstead*, 20 NY3d 481, 485 [2013]).

§ 7-3. Comprehensive Plan. A comprehensive plan means the materials (written and/or graphic) including but not limited to maps, charts, studies, resolutions, reports and other descriptive material that identify the goals, objectives, principles, guidelines, policies, standards, devices and instruments for the immediate and long-range protection, enhancement, growth and development of the town located outside the limits of any incorporated village or city (see Town Law § 272-a[2]). In other words, the comprehensive plan provides a longer term guide on how a town will be

developed. As such, towns must adopt their local zoning laws in accordance with the comprehensive plan (see Town Law § 272-a[11]). Although there is no specific timeframe within which towns must review their comprehensive plans, Town Law § 272-a(10) does call for "periodic review" (see Town Law § 272-a [10]). If a town plans to adopt or amend its comprehensive plan, it must hold a public hearing on at least 10 days' notice (see Town Law § 272-a[6]). Additionally, adopting or amending a comprehensive plan is subject to SEQRA review (see Town Law § 272-a [8]).

§ 7-4. Role of the Town Board. The town board, as the legislative body, adopts local planning and zoning laws and ordinances. The town board also appoints members to the zoning board of appeals (ZBA) and planning board and may assign certain tasks to those boards such as planning board review of special use permit applications. Significantly, if the town board does not agree with a ZBA or planning board decision, it has no authority to review or change the decision. The appropriate means of challenging a planning or zoning board decision is for an individual with standing, such as the applicant or an aggrieved neighbor, to commence an Article 78 proceeding.

§ 7-5. State Environmental Quality Review Act (SEQRA). Most actions taken by the town board, planning board and zoning board of appeals are subject to SEQRA review. Please refer to Chapter 5 of this manual for more information on what SEQRA entails.

ARTICLE II. Zoning Board of Appeals (ZBA).

§ 7- 6. Membership and Removal. The ZBA is a three- or five-member board comprised of individuals appointed by the town board (see Town Law § 267 [2]). The town board also designates the chairperson of the ZBA and may, by local law or ordinance, create the position of and appoint an alternate (see Town Law § 267 [2],[11]). Once appointed, a ZBA member may be removed from office only for cause and

after a public hearing (see Town Law § 267[9]). This means that before the town board can remove a ZBA member, it must hold an administrative-type hearing and produce factual evidence substantiating just cause for removal (see *Adamkoski v. Town Bd. of Town of Perth*, 47 AD2d 783, 783 [3d Dept 1975]).

§ 7-7. Residency and Oath of Office. ZBA members are considered public officials (see 1997 Ops Atty Gen (Inf) 1125 [1997]) and thus subject to the residency requirements found under Public Officers Law § 3 as well as Town Law § 23.

§ 7-8. Terms of Office. If the ZBA is newly created, terms are fixed so that one member's term expires at the end of the calendar year in which ZBA members were initially appointed. The remaining members' terms shall be so fixed that one member's term expires at the end of each year thereafter. In other words, when a ZBA is created, one member serves for one year, another member serves for two years, another member serves for three years and so on.

At the expiration of each original member's appointment, the replacement member is appointed for a term equal in years to the number of members of the board (see Town Law § 267 [4],[5]). Thus, on a seven-member board, the term of office is seven years, and on a five-member board, the term is five years.

§ 7-9. Training. ZBA members must annually complete at least four hours of town board-approved training (see Town Law § 267 [7-a]). Training hours may be carried over in any one year (see id.), and the town board may also waive the training requirements if it is deemed in the best interest of the town (see Town Law § 267-[7-a][c]).

§ 7-10. Responsibilities. The ZBA is in charge of deciding area and use variance applications and interpreting the local zoning code. It is important to note that, under Town Law §

267-b, a ZBA has appellate authority only. This means that a ZBA does not determine matters in the first instance. For example, if an applicant wants to build a structure that exceeds the size limitations set by the town, he or she would first have to apply for a permit, have that permit denied and then seek a variance from the ZBA.

A. Use Variances (Town Law § 267-b): A use variance allows property to be used in a way that a local zoning code prohibits. To be granted a use variance, an applicant must demonstrate an unnecessary hardship. To prove that there is an unnecessary hardship, an applicant must show:

1. that the property cannot yield a reasonable return as currently zoned – referred to sometimes in courts as "dollars and cents proof;"

2. that the hardship is unique and does not apply to most of area;

3. that, if granted, the variance will not alter essential character of neighborhood;

4. that the alleged hardship is not self-created.

The ZBA can impose reasonable conditions and restrictions that (1) directly or incidentally relate to the proposed use of property (2) are consistent with the intent of zoning law, and (3) are imposed to minimize any adverse impact the variance may have on the neighborhood or community.

B. Area Variances (Town Law § 267-b): An area variance allows a deviance from a zoning code's dimensional standards. When reviewing an area variance application, a ZBA must balance the variance's benefit to the applicant versus the detriment to health, safety and welfare of neighborhood / community. The ZBA must

also consider:

1. Does the variance create an undesirable change in character of neighborhood, or is it detrimental to neighboring properties?

2. Can the applicant's goal be achieved some other way?

3. Is the area variance substantial?

4. Is there an adverse effect on physical / environmental conditions of the neighborhood?

5. Is the alleged hardship self-created?

As with a use variance, the ZBA may impose reasonable conditions and restrictions that (1) directly or incidentally relate to the proposed use of property (2) are consistent with the intent of zoning law, and (3) are imposed to minimize any adverse impact the variance may have on the neighborhood or community.

C. Interpretations: The ZBA has the authority to interpret a town's local zoning code (see Town Law § 267-b[1]). Interpretations should be reasonable / have a rational basis, and courts have said that zoning ordinances must be "construed as a whole, reading all of its parts together, all of which should be harmonized to ascertain legislative intent, and it should be given its plain meaning, avoiding a construction that renders superfluous any language in the ordinance," *(Saratoga County Economic Opportunity Council, Inc. v. Vil. of Ballston Spa Zoning Bd. of Appeals*, 112 AD3d 1035, 1037 [3d Dept 2013]). Furthermore, ambiguity in the language of the ordinance should be construed in favor of the property owner (see id.).

ARTICLE III. Planning Board

§ 7-11. Creation and Abolishment. Towns are not required to have planning boards; however, the town board may create one by local law or ordinance (see Town Law § 271[1]). If a town opts not to have one, the town board or another body may assume the functions normally reserved for the planning board. Once created, the town board also has the power to abolish the planning board (see *Conklin v. Town Bd. of Town of Warwick*, 59 AD2d 532, 533 [2d Dept 1977]). However, this is not unfettered authority, and a town board may not abolish a planning board simply for the purpose of creating another one and appointing new members (see AG Opinion 78-585).

§ 7-12. Membership and Removal. The town board may create either a five- or seven-member planning board. Should the town board decide to increase the number of positions from five to seven or decrease the number from seven to five, it can do so either by local law or ordinance (see Town Law 271[6],[7]).

The town board appoints members of the five- or seven-person board and also designates one of the planning board members as chairperson (see Town Law 271[1]). Additionally, the town board may, by local law or ordinance, create the position of planning board alternate and appoint an individual to that position (see Town Law § 271 [15][a]). If the alternate is unable to participate because of a conflict of interest, then the chairperson of the planning board may designate a substitute for the alternate (see Town Law § 271 [15][b]).

A planning board member may be removed only for cause and after a public hearing (see Town Law § 271 [9]). This means that before the town board can remove a planning board member, it must hold an administrative-type hearing and produce factual evidence substantiating just cause for removal (see *Adamkoski v. Town Bd. of Town of Perth*, 47

AD2d 783, 783 [3d Dept 1975]).

§ 7-13. Residency and Oath of Office. Planning Board members are considered public officials and thus subject to the residency requirements found under Public Officers Law § 3 as well as Town Law § 23 (see 1961 Ops Atty Gen No 138 [Aug. 10, 1961]).

§ 7-14. Training Requirement. Under state law, planning board members must annually complete at least four hours of town board-approved training (see Town Law § 271 [7-a]). Training hours may be carried over in any one year (see id.), and the town board may also waive the training requirements if it is deemed to be in the best interest of the town (see Town Law § 271-[7-a][c]).

§ 7-15. Responsibilities. The planning board may perform just the tasks assigned to it by the town board. Most commonly, town boards, through local law or ordinance, task the planning board with site plan review (see Town Law § 274-a), making determinations on special use permit applications (see Town Law 274-b), and performing subdivision review (see Town Law § 276). The town board may also seek recommendations from the planning board. Under Town Law § 271(13), the planning board may make recommendations to the town board on any subject matter over which the planning board has jurisdiction. The town board may also task the planning board to prepare proposed amendments to the town's comprehensive plan (see Town Law § 272-a); however, as the legislative body of the town, the town board makes the final determination on whether to adopt those proposals.

ARTICLE III. Tools Used in Zoning and Planning.

§ 7-16. Site Plan Review (Town Law § 274-a). Site plan review may be done by the town board or delegated to another body such as the planning board. A site plan shows the arrangement, layout and design of a proposed use of a

parcel of land. It's a tool used to ensure that proposed development properly fits and conforms to the character of the neighborhood. Site plan review also protects against adverse impacts on neighboring properties that may result from development. A town's local code should clearly list which uses, if any, require site plan review including what elements, such as parking, signs, landscaping, may be reviewed as part of the review (see Town Law § 271-a[2]). Site plan review is subject to SEQRA review.

A. Conditions: In order to ameliorate potential unwanted effects, the planning board, town board or other administrative body tasked with site plan review may impose reasonable conditions and restrictions directly related to and incidental to a site plan (see Town Law § 274-a[4]). However, this authority is restricted, and there must be a connection between the condition imposed by the board and the problem that it attempts to alleviate.

B. Public Hearing: Public hearings are not required by state law on site plan review applications; however, the town may require public hearings in its own local law (see Town Law § 274-a[8]). If required, the public hearing must be held within 62 days of the application being received by the reviewing body (see id.). Additionally, the authorized board must mail the applicant notice of the hearing at least 10 days before and give public notice in a newspaper of general circulation in the town at least five days before the public hearing (see id.).

C. Notice to County Planning Board: At least 10 days before the public hearing, notice must be given to the county planning board in accordance with General Municipal Law § 239-m along with a full statement of the proposed action (see Town Law § 274-a[9]). In the event a public hearing is not required, the proposed action should be referred to the county planning board before

the final action is taken.

D. Decisions: The reviewing body must make a decision on the application within 62 days after a public hearing or if no hearing has been held, within 62 days of receiving the application. This time may be extended by mutual consent of the applicant and the reviewing board. The decision of the board must be filed in the town clerk's office within five business days of being rendered and a copy mailed to the applicant (see Town Law § 274-a[8]).

§ 7-17. Special Use Permits (Town Law § 274-b). Unlike a variance, a special use permit does not involve deviating from what's allowed in the local zoning code (see § 7-8, infra). Rather, a special use permit adds another layer of review for certain uses allowed under the town's local code to ensure that the community's character and other public health, safety and welfare concerns are protected. This gives towns flexibility and promotes diversity in the type of uses allowed in a district while still maintaining uses compatible with neighboring properties. For example, gas stations in a mixed residential zone are often subject to special use permits. Special use permits are subject to SEQRA review.

A. Conditions: Like site plan review, the body that approves special use permits may impose reasonable conditions and restrictions directly related to and incidental to a special use permit (see Town Law § 274-b[4]), and the town code should list what uses require a special use permit.

B. Public Hearing: A public hearing must be held within 62 days of the application being received by the reviewing body (see Town Law § 274-b[6]). Public notice must be published in a newspaper of general circulation in the town at least five days before the public hearing (see id.). Additionally, notice must be given to the applicant at least 10 days prior to the hearing (see Town

Law § 274-b[7]).

C. Notice to County Planning Board: At least 10 days before the public hearing, notice must be given to the county planning board in accordance with General Municipal Law § 239-m along with a full statement of the proposed action (see Town Law § 274-b[7]).

D. Decisions: The reviewing body must make a decision on the application within 62 days after a public hearing. This time may be extended by mutual consent of the applicant and the reviewing board. The decision of the board must be filed in the town clerk's office within five business days of being rendered and a copy mailed to the applicant (see Town Law § 274-a[8]).

§ 7-18. Subdivision Review (Town Law § 276). The town board may, by resolution, authorize and empower the planning board to approve preliminary and final plats of subdivisions showing lots, blocks or sites, with or without streets or highways, within that part of the town outside the limits of any incorporated village. Subdivision review has been described as follows:

Subdivision control attempts to guide the systematic development of a community or area while encouraging the provision of adequate facilities for the housing, distribution, comfort and convenience of local residents. It reflects a legislative judgment that the building up of unimproved and undeveloped areas ought to be accompanied by provision for roads and streets and other essential facilities to meet the basic needs of the new residents of the area. Subdivision control is aimed at protecting the community from an uneconomical development of land, and assuring persons living in the area where the subdivision is sought that there will be adequate streets, sewers, water supply, and other essential services *Marx v. Zoning Bd. of Appeals of Vil. of Mill Neck*, 137 AD2d 333, 336-37 (2d Dept 1988) (internal citations omitted).

Towns have the authority to define the term "subdivision" for those divisions of property or alteration of lot lines that require subdivision approval (see Town Law § 276[4][a]). Furthermore, subdivisions may be defined and delineated by local regulation as either "major" or "minor" with the review procedures and criteria for each set forth in the town's local code (see id.). Local regulations may also require an applicant to submit a preliminary plat before submitting a final plat that shows road and lot layout and approximate dimensions, key plan, topography and drainage etc. for approval before reviewing a final plat and final plat approval (see Town Law § 276 [4], [5],[6]). Towns should be sure to perform the requisite SEQRA review (see Town Law § 276 [5], [6]) and take note of all the public hearing and timing requirements found in Town Law §§ 276, 277. Additionally, towns must comply with the county notification requirements found in General Municipal Law § 239-m (see also Town Law § 276 [10]). Towns may refer to the Department of State's publication "Subdivision Review in New York State" or call the Association of Towns for further information on subdivision review.

§ 7-19. Nonconforming Uses. Sometimes property will be used in a certain way, and a zoning law will be adopted that prohibits that use of the property. In other words, the property no longer conforms to the local zoning code and is thus referred to as a nonconforming use. Landowners have a vested right to continue to use their property in that way, and thus the nonconforming use may continue; however, it may not be expanded. Additionally, one nonconforming use may not be replaced by another nonconforming use. In certain circumstances, towns may terminate a nonconforming use through amortization. "Amortization period" refers to a designated period of time granted to owners of nonconforming uses during which they may phase out their operations as they see fit and make other arrangements. The validity of an amortization period depends on its reasonableness (see *Vil. of Valatie v. Smith*, 83 NY2d 396, 400 [1994]).

§ 7-20. Variances. See § 7-8(A)(B) (supra).

ARTICLE IV. Enforcement.

§ 7-21. Enforcement Authority. Under Town Law § 268, a town board can, by local law or ordinance provide for the enforcement of its planning and zoning laws. A town has two options to obtain compliance with its zoning law: (1) an injunctive action in Supreme Court or (2) a prosecution in the local justice court, and a town simultaneously may maintain an injunctive action in Supreme Court and a prosecution in a justice court.

> **A. Fines.** If pursing prosecution in justice court, a violation of Town Law Article 16 or of a local law, ordinance or regulation is considered an offense, punishable by a fine not exceeding $350 or imprisonment for a period not to exceed six months, or both for conviction of a first offense. For the conviction of a second offense, both of which were committed within a period of five years, it is punishable by a fine not less than $350 nor more than $700 or imprisonment for a period not to exceed six months, or both; and, upon conviction for a third or subsequent offense, all of which were committed within a period of five years, it is punishable by a fine not less than $700 nor more than $1,000 or imprisonment for a period not to exceed six months, or both. For the purpose of conferring jurisdiction upon courts and judicial officers, generally, violations of Town Law Article 16 or of such local law, ordinance or regulation shall be deemed misdemeanors, and for such purpose, only all provisions of law relating to misdemeanors apply to such violations.

§ 7-22. Enforcement Officer. Towns may appoint an enforcement officer who is in charge of enforcing the codes, ordinances, rules and regulations of the town's zoning code (see Town Law § 138, 268. This may include issuing permits.

Some zoning enforcement officers may also be charged with enforcing the NYS Uniform Fire Prevention and Building Code and are referred to as Code Enforcement Officers (CEO) (see Executive Law § 381[2]). CEOs require special training, must be certified and are subject to continuing education requirements (see 19 NYCRR 1208-3.1 through 19 NYCRR 1208-3.5). The enforcement officer can administer the law only as written, and he or she has no authority to modify or waive zoning regulations. If the law is ambiguous or requires an interpretation, a permit should be denied, and the enforcement officer's decision should be appealed to the ZBA.

Chapter 8
SPECIAL IMPROVEMENT DISTRICTS
SEWER AND WATER IMPROVEMENTS

ARTICLE I. General Provisions.

§ 8-1. Purpose. Towns may create improvement districts to provide to particular property owners services that are not otherwise needed or wanted by other property owners in the town. They are supported solely by the real property taxpayers whose properties are located within the boundaries of the district. Therefore, the costs of operating these districts are not general town charges but special district charges.

§ 8-2. Administration. Most town improvement districts are governed by the town board (see Town Law §§198; 342). Improvement districts created prior to 1932 or by special act of the state Legislature may be governed by separately elected commissioners. The town board also has the authority to create a board of commissioners to assist the town board in the administration of ambulance districts (see Town Law §198 [10-f]).

§ 8-3. Specific types of improvement districts.

A. The following types of improvement districts may be established or extended by a town board: sewer, drainage, water, park, public parking, lighting, snow removal, water supply, ambulance, sidewalk, fallout shelter, refuse and garbage[1], aquatic plant control

[1] A refuse and garbage district also includes the authority to address "carbon components of energy waste from residential properties and the performance of energy audits and the purchase installation of energy efficiency improvements on such residential properties" (see Town Law §§198 (9)[b]; 209-i).

districts and watershed protection districts (see Town Law § 190).
Also, a harbor improvement, public dock or beach erosion control district may be established or extended in any town which borders or contains navigable waters of the state. (Id.) Under certain circumstances and under a special procedure, water storage and distribution districts and sewage disposal districts may similarly be established or extended by a town board (see Town Law §§ 190-a; 190-b).

B. **Wastewater disposal.** Towns may also create and extend wastewater disposal districts and improvements pursuant to Town Law Articles 12, 12-A and 12-C. These wastewater disposal improvements are intended for operation of on-site private wastewater disposal systems (septic systems) under governmental administration where it is not feasible to construct a regular public sewer system. The procedure for establishing and operating wastewater disposal systems is essentially the same as for a sewer system. A sewer district may also include a wastewater disposal system in its plan (see Town Law §§ 190-e, 190-f, etc.).

C. **Water quality treatment.** Towns may also establish water quality treatment districts, pursuant to petition only, for the purpose of installing, servicing and monitoring a water treatment device in a private water well. The expense of acquisition, installation and servicing of such water treatment device is chargeable to the benefited property, namely, the property in which such device is installed and maintained (see Town Law § 190-g).

§ 8-4. Limitations on Establishment.

A. A district may not be established or extended into a city (see Town Law § 190).

B. A district may not be established or extended, wholly or partly, in an incorporated village unless the village consents by a village local law, ordinance or resolution subject to a referendum on petition under Municipal Home Rule Law § 24, or a permissive referendum under Village Law Article 9. However, in the case of a water quality treatment district a village local law or resolution consenting is not subject to any referendum (see Town Law § 190).

C. A water supply district cannot be established or extended to include lands situated within the boundaries of a water district (see Town Law § 190).

§ 8-5. Ad Valorem and Benefit Districts. There are two basic types of improvement districts: "ad valorem" and "benefit."

A. **Ad valorem districts.** An *ad valorem* levy is a charge imposed on benefited real property in the same manner and at the same time as taxes for municipal purposes to defray the cost, including operation and maintenance, of a special improvement district. (see Town Law §§ 202[3] and 202-a[1]). Districts within this category are:

- Park
- Public parking*
- Lighting*
- Water*
- Snow removal
- Refuse and garbage*
- Water supply

- Sidewalk*
- Public dock
- Beach erosion control*
- Fallout shelter
- Water storage and distribution
- Aquatic plant growth control*
- Harbor improvement
- Ambulance
- Watershed protection improvement district

*__NOTE__: If the petition or order for their establishment so requires, the district may also be on the benefit basis.

B. **Benefit districts.** In benefit districts, benefited properties are charged in proportion to the benefit received to defray the cost, including operation and maintenance, of a special improvement district (see Town Law §§ 202[2]; 202-a[2]). Districts within this category are:

- Sewer (including trunk sewer)
- Sewage disposal
- Drainage (including drainage system)
- Wastewater disposal (septic tank)
- Water quality treatment (private water wells)

ARTICLE II. Establishment or Extension of Districts.

§ 8-6. Procedures.

A. **Petition or town board motion.** Under Town Law Article 12, an improvement district may be established or extended by petition. Alternatively, under Town Law Article 12A, the town board may initiate establishing or extending a district by motion. The procedure in Town Law Article 12-A was devised to eliminate the long delays associated with securing properly executed petitions

required under Article 12. The descriptions outlined below provide a general overview of the procedure and the town board should consult with the town attorney to make sure the town meets all procedural requirements.

§ 8-7. Article 12 Petition Method.

A. **Boundary description; costs.** The petition should describe the boundaries of the district or extension. If the petition requests constructing or acquiring an improvement, such as water mains and appurtenances, it must state the maximum proposed amount to be expended. If the petition requests the performance or supply of a service, like street lighting, it may (but need not) state the maximum proposed amount to be expended annually for such service. A petition for the establishment or extension of a park or public parking district must, in addition, describe the property proposed to be acquired for the park or parking district (see Town Law § 191).

B. **Signatures.**

1. The petition must be signed by the owners of taxable real property located in the proposed district or extension that own, in the aggregate, at least one-half of the assessed valuation of all the real property in the proposed district or extension. Additionally, if there are any resident owners, the petition must include the signatures of such resident owners owning taxable real property aggregating at least one-half of the assessed valuation of the taxable real property in the proposed district or extension owned by residents (see Town Law § 191).

2. In the case of a petition to establish a water storage and distribution district, the petition must be signed by at least 25 owners of taxable real property situated within each water district or water supply district proposed to be included in the water storage

and distribution district, or by 5 percent of the owners of taxable real property situated within each such district, whichever is less; or in the case of a water district governed by a separate board of water commissioners, the petition must be signed by a majority of the separate board (see Town Law § 190-c).

C. **Supporting documentation.**

1. **Maps and plans:** A map or plan prepared by a competent engineer must accompany every petition for the establishment or extension of a sewer, drainage, wastewater disposal or water district (see Town Law § 192). A map and plan is not specifically required in other districts; however, it is advisable to include some kind of a map showing the boundaries of the district with the petition so that those asked to sign the petition know whether their property will benefit from the proposed district or extension.

Additionally, in the case of a sewer, drainage, wastewater disposal or water district, before the petition is presented, the town board may adopt a resolution, subject to a permissive referendum, appropriating a specific amount for the preparation of the map and plan. This appropriation comes from general town funds, and, upon the establishment of the district, the amount appropriated should be deemed part of the cost of the improvement. The town will be reimbursed in the amount paid or a portion of that amount as the town board, at the public hearing on the question of the establishment or extension of the district, allocates against such new district or extension (see Town Law § 191-a).

2. **Studies.** Under Town Law § 190-c, with respect to proposed water storage or water distribution districts, upon petition, the town board must, or after a public hearing may on its own motion, make a study

of the proposal and for the following purposes :

a) Assemble data relating to the water resources available to the town and the possibility of developing such resources.

b) Conduct investigations, make inquiries and conduct public meetings upon such notice as it shall deem proper for the purpose of examining whether further action is necessary.

c) Cause maps and plans to be prepared. The maps and plans must show:

i. The identity and boundaries of the water districts that stand to benefit most by the establishment or extension of a water storage and distribution district, from the town board's point of view.

ii. A written description, as in a deed of conveyance, of the boundaries of the proposed district or extension.

iii. The source of water supply and a description of the lands, streams, water and water rights and facilities, if any, to be acquired therefor; the mode of constructing the proposed water works and the location thereof, including reservoirs, water purification or treatment works, standpipes, wells, pumping stations, aqueducts and mains.

iv. Estimates of the cost of construction or acquisition of the

facilities as shown on the maps and plans.

v. The method of financing the same, including estimates of revenue to be derived annually from the sale of water to water and water supply districts within the water storage and distribution district, and revenue to be derived from the sale of water to a village or from any other source; estimates of the cost of maintenance and operation and of debt service.

D. **Acknowledgement.** All petitions must be acknowledged or proved in the same manner as a recorded deed (see Town Law § 191).

E. **Public hearing; publication of estimated costs; determination.**

1. Order. When presented with a petition to establish or extend a district, the town board must adopt an order reciting the fact that it was presented with a petition, the boundaries of the proposed district or extension, the improvements or services proposed, the maximum amount proposed to be expended if a maximum amount is stated in the petition, the estimated cost of hookup fees (if any), the cost of the district or extension to the typical property and, if different, to the typical one- or two-family home.

The order must also specify the time and place of the public hearing where the town board will meet to consider the petition. The order must be published in the official newspaper of the town and also posted on the town clerk's signboard at least once not less than 10 nor more than 20 days before the date of the hearing (see Town Law § 193).

2. Estimated costs. Before publishing the order containing the estimated costs, the town board must prepare and file with the town clerk a detailed explanation of how the estimated costs were computed (see Town Law § 193).

3. Determinations. Pursuant to Town Law § 194, after holding the public hearing, the town board must make the following specific determinations by a formal resolution:

a) Whether the petition is signed and acknowledged or proved as required by law and is otherwise sufficient;

b) Whether all the property and property owners within the proposed district or extension are benefited;

c) Whether all the property and property owners benefited are included within the limits of the proposed district or extension; and

d) Whether it is in the public interest to grant in whole or in part the relief sought.

4. Additional Hearings. Special provision is made for an additional hearing in the event the town board finds that any property or property owners in the district are not benefited or that certain property or property owners benefited have not been included in the district (see Town Law § 194[2][b]).

F. **Consent of state comptroller.** In cases where the borrowing is necessary to finance the cost of the proposed improvement, permission from the state comptroller to establish or extend the district may be required pursuant to Town Law § 194. This is

accomplished by filing a certified copy (in duplicate) of the resolution establishing the district within 10 days after its adoption and an application with the state comptroller.

1. The application, in duplicate, must include the following:

a) A certified copy of the notice of public hearing, with proof of publishing and posting and a certified copy of the petition;

b) In the case of a sewer, drainage or water district, a certified copy of the map, plan and report;

c) An itemized statement of outstanding indebtedness for all town purposes;

d) The amount of indebtedness anticipated to be contracted for the proposed district;

e) A statement of the aggregate assessed valuation of the real property of the proposed district;

f) A statement of the average full valuation of the taxable real property of the town;

g) A statement of the proposed method for financing the improvement; and

In cases where no borrowing will be involved, or where the costs of such financing to typical properties for similar types of districts falls below the average costs for such districts as annually computed by the comptroller, it is not necessary to obtain consent from the comptroller. If the state comptroller grants permission, the town board may adopt an order establishing or extending the

district. If permission is denied, the town board must adopt an order denying the petition (see Town Law § 194). Additional information can be found in the Regulations of the State Comptroller 2 NYCRR Part 85.

G. **Filing of final order of town board.** Within 10 days of the town board adopting the final order establishing the district or extension, the town clerk must file a certified copy in the county clerk's office and in the office of the state comptroller (see Town Law § 195[1]).

H. **Final plans; estimate of expenses; contracts to perform work.** After the final order is filed, the town board may proceed. This involves having the engineer prepare definite plans and specifications and a careful estimate of the expense, working with the attorney employed by the town and preparing a proposed contract. Towns must abide by the competitive bidding requirements set forth in Article 5-A of the General Municipal Law discussed in Chapter 4 of this manual. The town board may not award contracts if the cost of the contract, plus the services of the engineer, attorney and related expenses, will exceed the estimated maximum costs stated in the petition or final order (or as stated in the resolution of town board if the procedure described below in Article 12-A is followed) (see Town Law § 197). The law provides procedures for increasing the maximum amount to be expended, but this requires:

1. In the case of constructing improvements, either one of the following two alternatives: (a) the execution of a new petition and a new public hearing; or (b) an order of the town board on its own motion after a public hearing and subject to a permissive referendum. Both alternatives also require an order of the state comptroller approving such increase before holding a public hearing (see Town Law §§ 202–d [1]; 209–h).

2. In cases involving the supplying of services only, the maximum amount to be expended annually may be increased by an order of the town board, provided the town board shall, after a public hearing, determine that it is in the public interest to authorize the increase. No petition, permissive referendum or order of the state comptroller is required (see Town Law §§ 202–d [2]; 209–h [2]).

§ 8-8. Article 12-A Town Board Initiative.

A. **Similarities with Article 12 procedure.** The procedure for establishing or extending an improvement district under Article 12-A is essentially the same as the procedure described above under Article 12. The basic difference has to do with the steps involved in initiating the proceeding, (i.e., by town board motion compared to a petition).

B. **Maps, plans and reports.** The establishment or extension of an improvement district is based on a map, plan and report prepared in a manner and detail determined by the town board. The map, plan and report must be filed in the office of the town clerk (see Town Law § 209-c).

1. Maps, plans and reports of a sewer, drainage or water district must be prepared by a licensed engineer and show the boundaries, the general plan and the proposed method of operation of the district (see Town Law § 209-c).

2. For all other districts, the maps, plans and reports may be prepared by town officials or by an outside firm (see Town Law §§ 209-b; 209-c).

3. In the case of a sewer district, a copy of the map and plan must be submitted to the New York State Department of Health for approval before any sewer

system is constructed (see Town Law § 209-c).

4. The procedure described in connection with Article 12 for the appropriation of general town monies to cover the preparation costs of maps, plans and reports in connection with sewer, drainage and water districts is extended to allow such appropriations for the preparation of maps, plans and reports for districts proposed to be established or extended under Article 12-A procedure (see Town Law § 209-b).

C. **Order.** After filing the map, plans and report in the office of town clerk, the town board must adopt an order describing the district or extension, the improvements or services proposed, the maximum amount to be expended, the proposed method of financing, and the fact that the map, plans and report have been filed in the town clerk's office. The order should also specify the time and place where the town board will meet and hold a public hearing on the proposed district or extension. If the order calls for the performance or supply of a service only, it may (but need not) state the maximum amount proposed to be expended annually for such service. Publication and posting requirements are the same as described under Article 12 (see Town Law § 209 –d; cf. § 8-7 [E][1]).

D. **Determinations.** After the public hearing, the town board must make the same determinations outlined above in § 8-7 [E][3]. The subsequent procedure is the same, except the resolution of the town board approving the establishment or extension of the district is subject to a permissive referendum in the manner provided in Town Law Article 7 (see Town Law § 209-e).

1. A petition requesting a referendum must be signed by at least 5 percent of the owners of taxable real property situated in the proposed district or

extension, or by 100 owners, whichever is less (Town Law § 209-e). For the purposes of this subsection, a corporate owner of such taxable real property is considered one owner for the purpose of a petition requesting a referendum and is entitled to one vote to be cast by an officer or agent of the corporation or other duly authorized person designated by appropriate resolution of such corporation.

2. If a referendum is required and the proposal is approved, or if no petition for referendum is filed within the required time, the town board resolution becomes effective, and the town board proceeds in the same manner as discussed under Article 12.

E. Application for permission of state comptroller to establish or extend district. Within 10 days after a town board adopts a resolution approving the district, the town clerk must file an application with the state comptroller for permission to establish or extend the district if the cost is to be financed by the issuance of bonds or notes, or if the cost to typical properties exceeds the statewide average for that type of district (see Town Law § 209-f).

1. A certified copy of the resolution of the town board, in duplicate, must accompany the application.

2. The application, in duplicate, must include the following:

a) A certified copy of the notice of public hearing, with proof of publishing and posting;

b) In the case of a sewer, drainage or water district, a certified copy of the map, plan and report;

c) An itemized statement of outstanding

indebtedness for all town purposes;

d) The amount of indebtedness anticipated to be contracted for the proposed district;

e) A statement of the aggregate assessed valuation of the real property of the proposed district;

f) A statement of the average full valuation of the taxable real property of the town;

g) A statement of the proposed method for financing the improvement;

h) Under Article 12-A, a town clerk's affidavit evidencing that no petition was timely filed requesting a referendum, or if a special election was held, certified copies of the official result.

If the state comptroller grants permission, the town board must adopt an order establishing the district. If the state comptroller denies permission, the town board must adopt an order terminating its proceedings (see Town Law § 209-f [5]).

ARTICLE III. Article 12-C Sewer, Wastewater Disposal, Water and Drainage Improvements as Town Functions.

§ 8-9. Overview.

A. Statutory authority. Town Law Article 12-C, specifically Town Law § 209-q, authorizes any town board to provide for sewer, water, drainage or wastewater disposal improvements as a town function in the entire area of the town or in an area within the town outside a village. The town board is responsible for the management, maintenance, operation and repair of any such sewer or water improvement acquired, constructed

or provided pursuant to Article 12-C. The powers contained in Article 12-C are in addition to, and do not limit or supersede, those in Town Law Articles 12 and 12-A.

B. Cost of providing improvements. The cost of providing improvements may, under proper circumstances, be raised on a benefit or ad valorem basis. This differs from Articles 12 and 12-A, which provide that the expense of the establishment of a sewer district must be on a benefit basis. No part of these costs may be charged to any property in a village (see Town Law § 209-q).

C. Method of proposal. Any improvement may be proposed by a resolution of the town board or by a petition of resident taxpayers.

D. Action by town board.

1. **Supporting documentation.** A town board resolution proposing an improvement must be supported by plans, reports and maps.

a) The plans, reports and maps must be filed in the town clerk's office. Thereafter, the town board must adopt an order which shall include:

i. A recital of the proposed improvement, a description of the boundaries of the proposed benefited area, if any;

ii. The maximum amount proposed to be expended for the improvement;

iii. The proposed method of apportioning the costs;

iv. The proposed method of financing;

v. A statement that a plan, report and map are on file in the town clerk's office for public inspection; and

vi. The time and place of the public hearing.

b) A copy of the order must be published in the official newspaper (see Town Law § 209-q[3] for all of the requirements) and posted on the bulletin board in the town clerk's office.

2. **Changes to proposal.** After the public hearing, the town board may change the proposal if some property in the proposed area will not be benefited, if some property that will be benefited has not been included or if the town board determines that the apportionment of costs should be changed. If changes are proposed, another public hearing must be held between 15 and 25 days after the first hearing. The notice of hearing must specify the changes and the time and place for this second hearing (see Town Law §209-q[4]).

3. **Determination.** After the hearings, the town board must determine whether to make such improvement (see Town Law §209-q[6]).

a) If the town board determines that it is not in the public interest, the board must adopt a resolution to that effect.

b) If the town board determines that it is in the public interest, it must adopt a resolution authorizing the sewer, water or drainage improvement. If the proposal requires that

the cost be financed by the issuance of bonds or notes, the approval of the state comptroller is required (see Town Law §209-q[6][13]). The resolution must state the manner in which the costs are to be apportioned, and if the board determines that any part of the cost is to be raised by special benefit assessments, then the boundaries of the benefited area as well (see Town Law §209-q[6]).

E. Proposal by petition.

1. **Supporting documentation.** Pursuant to Town Law § 209-q[10], a proposal by a petition must be signed by five resident owners of taxable property located within the area of the town outside of the village. The petition must be acknowledged or proved in the same manner as a deed to be recorded or authenticated in the manner provided by the Election Law for the authentication of nominating petitions. The town board may direct that a plan, report and map be prepared, or it may, by resolution, describe in general terms the filing of the petition and the proposed improvement. If the town board determines that the proposed improvement is in the public interest and economically feasible and where a plan, report and map have not been prepared, then it must direct the preparation of a general plan, report and map.

2. **Public hearing.** A public hearing must be initiated in the same manner as provided in Town Law § 209-q[3].

3. **Deposit.** The petitioners must deposit $100 with the petition to cover the costs of publishing and posting notices of meetings of the town board to consider the petition. If the town board decides to proceed with the proposed improvements, the total deposit shall be returned to the petitioners; if the petition is denied, only the balance shall be returned after expenses have been

paid.

4. **Apportionment of costs (Town Law §209-q [8][a])**

a) The cost of the improvement shall be borne in the following manner:

i. Entirely by the area of the town outside the village;

ii. Partly by the area of the town outside the village and partly by the lands benefited; or

iii. Entirely by the lands benefited.

b) At any time after the improvement is complete and after a public hearing, the town board may, by resolution, change the apportionment of the costs between the benefited area and the area of the town outside the village (see Town Law §209-q[8][c]). However, this authority is limited to allowing an increase in the share borne by the area of the town outside the village, with a corresponding decrease in the share borne by the benefited area.

F. Referendum.

1. **Referendum required.** A resolution adopted by the town board authorizing an improvement is subject to a permissive referendum if all or part of the cost is to be borne by the entire area of the town outside of any villages. After the completion of the improvement, a resolution of the town board to change the apportionment of cost is also subject to a permissive referendum (see Town Law § 209-q[11][a]).

2. **Optional referendum.** Except as noted above, the town board may provide that any resolution authorizing such an improvement shall be subject to a mandatory or permissive referendum. The referendum must be held in the entire area of the town outside any villages, except that if the authorizing resolution provides that a part of the cost of the improvement is to be borne by an area less than the entire town outside any villages, the resolution may provide for the referendum to be held in the lesser area (see Town Law § 209-q[11][b]).

3. **Approval required.** A resolution submitted to a referendum must be approved by a majority of the owners of taxable real property located in the area designated by the town board. A petition requesting the referendum must be signed by at least 10 percent of such owners. The town clerk must have the forms for a petition prepared for distribution to anyone requesting them (see Town Law § 209-q[11][c]).

G. Approval of state comptroller (see Town Law § 209-q[13]).

1. Under Town Law Article 12-c approval of the state comptroller is required when it is proposed or required that the town finance the cost of any sewer, drainage or water improvement by the issuance of bonds, notes, certificates or other evidences of indebtedness of the town therefor. Additionally, where the total estimated expense of such improvement (including any increase in the maximum amount) exceeds one-tenth of 1 percent of the full valuation of the taxable real property in the area of the town outside of villages, approval from the state comptroller is required.

2. Within 10 days after adopting a resolution where approval of the state comptroller is required, the town

clerk must file a certified copy of the town board's resolution authorizing the sewer or water improvement with the Department of Audit and Control. The copy of the resolution must be accompanied by an application for approval. The application must be executed and verified by the supervisor or such other officer as the town board and must contain the information required by the state comptroller.

3. The state comptroller determines whether the public interest will be served by providing the improvement in the manner proposed and also whether the cost of such improvement will be an undue burden upon the property bearing the cost.

4. The state comptroller must file an order granting or denying approval for the establishment of the improvement with the town clerk. The town clerk must notify the town board of the order's receipt and the decision of the state comptroller.

ARTICLE IV. Consolidation and Dissolution.

Town improvement districts may be consolidated or dissolved pursuant to the procedure set forth in Article 17-A of the General Municipal Law. Please see the section in Chapter 10 regarding consolidation and dissolution.

ARTICLE V. Local Water and Sewer Authorities.

§ 8-10. Statutory Authority; Creation; Powers and Duties.
Public Authorities Law Article 5, Title 8-A, provides the procedure for creating and operating a local water or sewer authority. Such local authority would be established by special act of the state Legislature upon request by, and for the benefit of, the sponsoring municipality. Such local authority, after creation and appointment of an administering body by the sponsoring municipality, would be empowered to construct and operate a water supply or

sewer project, to issue debt and to charge rates and fees for the use of its services and facilities. This authority technique is designed as an alternative to existing authorizations for the purpose of constructing, reconstructing or rehabilitating water supply and/or sewer systems.

Chapter 9
FIRE PROTECTION AND EMERGENCY AMBULANCE SERVICES

§ 9-1. Purpose. Generally speaking, towns are not authorized to provide fire protection as a town function (although there are a few towns that do have town fire departments). Instead, fire protection is provided in towns outside of villages by means of a fire, fire alarm or fire protection district (see Town Law §§ 170, 171). A fire district provides fire protection services within the district as a "political subdivision" or "district corporation," separate and apart from the town (see Town Law § 174 [7]), while a fire alarm district or fire protection district is a geographic area in which the town board must contract on behalf of to provide fire protection services (see Town Law §§ 170, 171). A town may contract with any city, village, fire district or incorporated fire company to furnish fire protection within fire alarm districts and fire protection districts (see Town Law §§ 183, 184).

§ 9-2. Fire Districts.

A. **Creation or extension; public hearing requirements.** A fire district may be created or extended either on petition by resident taxpayers owning taxable real property amounting to at least one-half of the assessed valuation of the taxable real property encompassed within the proposed district, or by the town board on its own motion. In each case, a public hearing before the town board on notice is required; specifically, the town board must publish notice in a newspaper of general circulation throughout the town 10 to 20 days before such hearing.

Additionally, the town clerk must post notice of the public hearing on the town sign board, as well as on the

town's website, 10 to 20 days prior to the hearing. The notice must include a description of the proposed district or extension, the estimated rate per thousand dollars of assessed valuation projected to be assessed, levied and collected, as well as the time and the place the public hearing will occur. Additionally, a detailed explanation of the estimated rate of assessment for the proposed district or extension must be made available for public inspection at the town clerk's office.

A fire district or an extension thereof must be outside of an incorporated village or city or existing fire, fire alarm or fire protection district. On the creation or extension of a fire district, the approval of the state comptroller is required if any expenditure of the district is to be financed by the issuance of bonds, notes, certificates or other evidences of indebtedness (see Town Law § 173 [2]). The resolution of the town board to create or extend the district, whether the town board proceeds by petition or by its own initiative, is not subject to a permissive referendum. It should be noted that a fire district may not be extended until the written consent of a majority of the fire district commissioners is obtained.

Once the resolution establishing or extending the fire district is adopted by the town board, the town clerk must file a certified copy of the resolution in the county clerk's office. Additionally, the town clerk must file a certified copy of the resolution with the state department of audit and control within 10 days from the date the resolution is adopted.

B. **Status; administration; budget.** After a fire district is created, it becomes an independent unit of government, possessing independent taxing, borrowing and purchasing powers. It is administered by a separate board of five elected fire commissioners. This board annually prepares the budget for the operation of the fire district during the ensuing year. A public hearing on the budget must be conducted on the

third Tuesday in October. The board of commissioners must adopt the budget on or before November 4. Once the fire district budget is adopted, the fire district secretary must deliver two certified copies of the budget to the town clerk within three days from the date of adoption. The town board is prohibited from making any changes to the fire district budget and must append it to the town budget as is (see Town Law § 181).

C. **Expenditures; employees; public hearing requirements.** Town Law limits the amount of fire district revenues that may be expended annually without the adoption of a proposition. Pursuant to Town Law § 176 (18) (4), a fire district has the authority to expend funds appropriated, without proposition, for the compensation of paid fire district officers, fire department officers, firemen and other paid personnel. Moreover, Town Law § 176 (18-a) provides that the fire district may employ such individuals as may be necessary to effectuate the objects and purposes of the district. If such person to be employed is a paid fireman, the fire district must conduct a public hearing regarding the employment, publishing notice of the public hearing in the official newspaper at least once not more than 20 and no less than 10 days prior to the hearing, and such notice shall include the time, date and location of the hearing, as well as the number of paid firemen to be employed and the total annual amount to be spent for the salaries or other compensation of such firemen.

Accordingly, the fire district has the authority to hire employees and personnel without a referendum or proposition, so long as the district stays within the confines of the amount appropriated for such fiscal year. Should the district wish to exceed the amount appropriated, the procedure is governed by Town Law § 179, which provides that the board of fire commissioners may, upon its own motion and upon petition, submit at a special or annual fire district election, a proposition to, among other things, expend in any one fiscal year, or to expend annually, an

amount in excess of the amount authorized by Town Law § 176 (18). If there is such a proposition, it must state the maximum amount that may be expended annually in excess of the amount authorized under Town Law § 176 (18).

So, if the fire district wishes to hire employees within its appropriations, it may do so without a proposition, although the hiring of paid fireman is subject to public hearing requirements. If the district wishes to hire employees that exceed the appropriations therefore, such additional expenses are subject to a proposition pursuant to Town Law § 179 (1) (d).

D. **Fire departments within districts.** Fire districts generally have their own fire departments. However, fire districts possess limited power, in certain cases, to contract for fire protection, emergency service and general ambulance service to be furnished within the district. Their fire companies need not be incorporated, but may be after public hearing and the consent of the board of fire commissioners. The chief officers of the fire department must be approved by the board of fire commissioners, and the volunteer firefighters elected by the fire companies also must receive board approval. The fire districts may contract to furnish fire, emergency and general ambulance services outside the district, and the fire department, subject to any restrictions imposed by the board of fire commissioners, may answer calls for assistance outside the district.

E. **Boundary lines.** When adjoining fire districts mutually agree to alter their common boundary line, they must obtain town board approval before the alteration takes place. Also, where a dispute arises between two fire districts as to location of their boundary line, the town board makes a decision after a survey and a public hearing on this issue (see Town Law §§ 172-a and 176 [5]).

§ 9-3. Fire Protection Districts.

A. **Creation or extension.** A fire protection district may be created or extended by the town board in the same manner as described above in the case of a fire district except in certain towns in the Adirondack Park. As in the case of a fire district, a fire protection district may not include territory in an incorporated village or city or existing fire, fire alarm or fire protection district.

B. **Provision of services.** It is not necessary to have a fire company in a fire protection district. The protection is furnished pursuant to a contract and may be for fire protection, emergency service and general ambulance service. The contract may be entered into either with a fire district or a city, village or incorporated fire company maintaining adequate and suitable apparatus and appliances for the furnishing of fire protection. This contract may be for a period up to five years' duration, and the amount of the contract must be for a definite sum (i.e., a specific dollar amount) and cannot be determined by some formula or other technique that depends upon future conditions. That does not mean that a contract could not provide for the town's providing gasoline in exchange for the fire protection services as long as precise, definite terms are used as to dollar value and quantity. The proposal for the contract must be advertised by the town board, and a public hearing must be held thereon.

1. If the contract is with a fire company located in the fire protection district, that company must be incorporated. This requires the consent of the town board and a public hearing on notice. The individuals named in the certificate of incorporation of such a fire corporation constitute the original membership. Thereafter, other eligible individuals may be elected as members of the fire corporation, but such election must be confirmed by the town board. Where any

such fire corporation furnishes fire protection outside of the boundaries specified in its certificate of incorporation, it and the members thereof shall be under the exclusive control of the town board of the town in which the fire corporation maintains its apparatus, and the town board may restrict the service of such corporation outside the boundaries described in its certificate of incorporation.

2. A court decision has held that a town may be liable for the negligence of a volunteer firefighter who was a member of a fire company with which the town board had a fire protection contract on behalf of a fire protection district. At the time of the claimed negligence, the volunteer firefighter was responding to a mutual aid call in his personal vehicle. In order to protect against possible similar liability, when entering into a fire protection contract with a volunteer fire company, the town board should consider requiring the fire company to obtain liability insurance naming the town as insured, or else obtain its own insurance coverage at district expense.

3. A town board may not purchase or authorize the purchase of equipment or apparatus for the fire departments contracting to furnish services in the fire protection district, although the town has broad powers to aid the district in natural disaster cases. A fire protection district has no power to borrow money. The town board, after a public hearing on notice, may contract on behalf of the district for a period not to exceed five years for a supply of water and hydrant service. Where such a water supply cannot be suitably supplied by contract, provision is made for acquisition of water rights and for construction and maintenance of fire suction pools, fire cisterns, fire wells, pipes, pumps, hydrants and other facilities, but money may not be borrowed for that purpose. In certain towns in the Adirondack

Park, the above-mentioned contracts, as well as contracts for fire protection, must be approved by the state comptroller.

§ 9-4. Fire Alarm Districts. A fire alarm district is created or extended in the same manner as a fire district. While the law provides for fire alarm districts, they are incredibly rare. Alarm systems may be provided in these districts and they have many of the powers of fire protection districts.

§ 9-5. Benefits. Where a fire protection or fire alarm district is furnished service by a fire company or fire department pursuant to a contract with another entity, or by an incorporated fire company located outside of such fire protection or fire alarm district, such contract must include a negotiated amount for the increase in cost of providing the benefits under the Volunteer Firefighters' Benefit Law. If the benefits are provided under a county self-insurance plan, the additional cost is not included in the contract (see Volunteer Firefighters Benefit Law § 30 [12]).

§ 9-6. Water Supply in Fire Districts. Instead of charging for water, the town board, in its discretion, may, without charge, permit the use of water from hydrants of a water district for fire purposes in all or any part of the area of a fire district, fire protection district, fire alarm district or "unprotected area" that is wholly or partly included within the area of the water district.

§ 9-7. Appropriations for Forest Fires and Natural Disasters. Pursuant to Town Law § 64 (15-a), the town board is authorized to appropriate not more than $1,000 in any one year for equipment for the prevention of forest fires. Additionally, a town may purchase and operate equipment itself for natural disaster emergencies, "such as flood, drought, tidal wave, fire, earthquake, hurricane, windstorm or other storm, landslide or other catastrophe arising from

causes other than enemy attack." This authority is separate and apart from a town supervisor's authority in declared emergency situations pursuant to Executive Law Article 2-B.

§ 9-8. Emergency Ambulance Services. A town has many options when it comes to providing emergency ambulance services. General Municipal Law § 122-b provides towns with the ability to provide their own emergency medical services or contract with one or more individuals, municipal corporations, associations or other organizations to provide emergency medical services, general ambulance services or any combination thereof. Under this authority, a town may enter into an agreement with a private ambulance company to provide emergency response services. The provision of ambulance services under General Municipal Law § 122-b is a town-wide charge.

Additionally, under articles 12 and 12-A of the town law, a town can create ambulance districts to provide emergency medical services within the boundaries of the established districts. Once the districts are created, Town Law § 198 (10-f) provides that the town board has the authority to contract with private entities to provide these services. Town Law requires parcels in an ambulance district to be assessed on an ad valorem basis (see Town Law § 202 [3]). That is, the parcels have to be assessed in the same manner and at the same time as other town charges (e.g. taxes). While ambulance districts have to be assessed on an ad valorem basis, the town does have the ability to impose additional fees on individuals utilizing the ambulance service.

A town does not have the authority to establish an ambulance district outside of its borders, with the exception of a village that is encompassed within the town. Article 17-A of the General Municipal Law, also known as the Government Reorganization and Citizen Empowerment Act, was enacted in 2010 to address consolidation and dissolution of local governments. This act has provided local governments with the ability to potentially establish a joint ambulance district.

To do so, neighboring local governments would first have to create and establish their own respective ambulance district within their borders under articles 12 and 12-A of the Town Law, as previously discussed. Then, under Article 17-A, the local governments would dissolve the individual districts and consolidate into one joint district. Note that the Association of Towns is unaware of any local governments that have undergone this process; however, there is the possibility that it could be done.

Under Town Law § 184, the town may also contract with any city, village, fire district or incorporated fire company to provide emergency ambulance services within a fire protection district under a fire protection contract. In this instance, the entity providing the emergency ambulance services must also provide fire protection within the fire district (see also General Municipal Law § 209-b).

Lastly, the town has the option to not provide for emergency ambulance services.

Chapter 10
MUNICIPAL COOPERATION

§ 10-1. Overview. For decades, towns have shared services, used intermunicipal agreements, and worked together and with other municipal governments to provide the best services to their residents, in the most efficient manner and at the lowest cost. Municipal cooperation can be thought of in two different ways – functional or structural. "Functional" cooperation refers to things like service agreements or joint agreements, whereas "structural" refers to consolidation or dissolution.

A. Functional Cooperation. As mentioned above, functional cooperation refers to service agreements, where one municipality agrees to provide services to another for a fee or for an exchange of resources and services, or joint agreements, where municipalities work together to provide a service.

1. Authority. Article IX, Section 1(c) of the New York State Constitution and General Municipal Law Article 5-G authorize towns to provide joint services with other municipalities or to provide services on a contract basis or pursuant to an agreement. Pursuant to these sections, with the authority to perform any function on its own, a municipality can carry out that function with another municipality that has the same authority. There are other statutes scattered throughout the law that allow for joint or shared services; for example, Town Law § 284 specifically authorizes intermunicipal cooperation in land use and comprehensive planning. General Municipal Law Article 5-G is, however, the primary source of authority in most instances.

2. Procedure. Any agreement entered into pursuant to General Municipal Law Article 5-G must be approved by the governing body of each participating

unit. For example, if a town and village agree to share office space, the town board and village board must approve the agreement. If a municipality would have to hold a public hearing, mandatory or permissive referendum or other special procedure if it were providing the service on its own, it must abide by those requirements before undertaking a joint effort.

3. Agreements. Intermunicipal agreements should contain all of the matters involved in the arrangement, such as a method or formula for equitably allocating expenses and revenues to cover financing costs and operating expenses. The agreement may also cover how to handle personnel, operation and maintenance of the facility, fixing and collecting charges, rates, rents or fees, establishing necessary rules and regulations, insurance and liability issues, performance standards and limitations on service. The duration of intermunicipal agreements is limited to five years, except where issuance of debt is involved (then the agreement may extend up to the period of probable usefulness for the object or purpose for which the debt was issued. Periods of probable usefulness are found in Local Finance Law § 11.00).

B. **Restructuring authority.** General Municipal Law Article 17-A authorizes local governments (a town, village or special improvement district) to dissolve (terminate its existence) or consolidate (combine two or more local government units).

C. **Consolidation Procedure.** Below is the general procedure for consolidating local government entities. For more information on the process, please call the Association of Towns' office.

1. Commencement: Consolidation proceedings can be commenced either by a joint resolution or elector initiative (see General Municipal Law § 751).

2. Board-Initiated Consolidation: The procedure to commence a board-initiated consolidation is outlined in General Municipal Law Article 17-a, Title 2. To summarize, the process starts with the creation and adoption of a proposed joint consolidation agreement by the governing bodies of each local government involved. A public hearing must be held on the proposed agreement and the local governments may approve the agreement, amend it or terminate the consolidation process. Once the agreement is approved, the local governments must set a date for a referendum; however, consolidation of special districts need not go to referendum. If the referendum passes, the local governments will be consolidated. If it fails, there is a four-year waiting period until the process can start again.

3. Voter-Initiated Consolidation: The voter-initiated consolidation process starts with the filing of a petition that meets the requirements set forth in General Municipal Law § 757. If the petition does not satisfy those requirements, the petition should be rejected. However, if it does, the local governments must hold a referendum. If the referendum fails, there is a four-year waiting period until the process can start again. If it passes, the local governments must approve a consolidation plan and hold a hearing on it. After the public hearing, the local governments may either amend or approve the consolidation plan. Once the plan is approved, there may be a petition filed for a permissive referendum on the consolidation plan. If that occurs, and there is a referendum on the consolidation plan, then the consolidation fails. If it passes, consolidation occurs.

D. **Dissolution Procedure**. Below is the general procedure for dissolving a local government entity found in General Municipal Law Article 17-a Title 3. Please note that a town may not dissolve; only a village, fire district, fire protection district, fire alarm district, special

improvement district or other improvement district, library district or other district created by law may do so.

1. Commencement: Dissolution proceedings can be commenced either by a joint resolution or elector initiative (see General Municipal Law § 773).

2. Board-Initiated Dissolution: The process starts by the governing body creating and passing a resolution endorsing a proposed dissolution plan. A public hearing must be held on the proposed plan, and after the hearing, the plan may be approved, amended, or it may terminate the dissolution process. Once the plan is approved, the local governments must set a date for a referendum; however, dissolution of special districts need not go to referendum. If the referendum passes, the local government / village will be dissolved. If it fails, there is a four-year waiting period until the process can start again.

3. Voter-Initiated Consolidation: The voter-initiated dissolution process starts with the filing of a petition that meets the requirements set forth in General Municipal Law § 779(1). If the petition does not satisfy those requirements, the petition should be rejected. However, if it does, the local government that will potentially dissolve must hold a referendum. If the referendum fails, there is a four-year waiting period until the process can start again. If it passes, the dissolving local government must approve a dissolution plan and hold a hearing on it. After the public hearing, the dissolving local government may either amend or approve the dissolution plan. Once the plan is approved, there may be a petition filed for a permissive referendum on the dissolution plan. If that occurs, and there is a referendum on the dissolution plan, then the dissolution fails. If it passes, the local government is dissolved.